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DEPRIVING OUR VETERANS OF THEIR CONSTITUTIONAL RIGHTS:
AN ANALYSIS OF THE DEPARTMENT OF VETERANS AFFAIRS'
PRACTICE OF STRIPPING VETERANS OF THEIR SECOND
AMENDMENT RIGHTS AND OUR NATION'S RESPONSE

Stacey-Rae Simcox*

INTRODUCTION

The oath that every enlisted member and officer of the United States Armed Forces takes before serving includes the solemn promise to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and to “bear true faith and allegiance to the same.”¹ This oath contains no time limit and many veterans consider themselves to be bound by these promises for their entire lives.²

* © 2019 Stacey-Rae Simcox. Stacey-Rae Simcox is Associate Professor of Law and Director of the Veterans Law Institute and Veterans Advocacy Clinic at Stetson University College of Law.

¹ 10 U.S.C. § 502 (2006). The full enlisted oath is as follows: “I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.” *Id.* The full officer oath is as follows: “I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God.” 5 U.S.C. § 3331 (1966); *see also* U.S. CONST. art. VI, cl. 3; 10 U.S.C. § 14309 (1966).

² For instance, consider the preamble to the Constitution of the American Legion: “For God and Country, we associate ourselves together for the following purposes: To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred percent Americanism; to preserve the memories and incidents of our associations in the Great Wars; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to Posterity the principles of justice, freedom and democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness.” AM. LEGION, NATIONAL CONSTITUTION (1977), <https://www.legion.org/documents/legion/pdf/Constitution%20and%20By-Laws%202007.pdf> [<https://perma.cc/QMF3-44DN>]. Similarly, the Disabled American Veterans includes in the preamble to their National Constitution “we former members of the armed forces of the United States . . . solemnly and firmly associate ourselves together in creating the Disabled American Veterans, the principles and purposes of which shall be supreme allegiance to the United States of America, fidelity to its Constitution and

In contrast to the veterans' lifelong promise to uphold the Constitution, the federal government is treading on the rights of many of these same veterans by systematically stripping them of their Second Amendment rights. This occurs when the Department of Veterans Affairs (VA) declares a veteran incapable of financially managing a benefit payment.³ To be clear, the VA is not making any determination that a veteran is mentally ill or a danger to himself or others when it determines the veteran "incompetent for VA purposes."⁴ The VA merely decides that the veteran may have difficulty appropriately managing monetary benefits received from the VA.⁵ The VA makes this determination haphazardly.

The results of the VA's determination that a veteran is financially incompetent are twofold: First, the VA ends up depositing the financially incompetent veteran into its fiduciary system, which is continually under criticism and extremely difficult to navigate, both when entering the fiduciary system and when trying to exit.⁶ Second, and most important for this Article, the financially incompetent veteran is then stripped of his⁷ constitutionally protected right to own, possess, transfer, purchase, and transport firearms without the same procedures and safeguards that are afforded to other United States citizens.⁸ This deprivation occurs when the VA

laws . . . P." *DISABLED AM. VETERANS*, NATIONAL CONSTITUTION (2014), <https://www.dav.org/wp-content/uploads/2014ConstitutionBylaws.pdf> [<https://perma.cc/B9MP-ZW5Z>].

³ 38 C.F.R. § 3.353(a)–(b) (2018).

⁴ Melanie Franco, *VA Benefits – What Happens When You Are Found Incompetent?*, HILL & PONTON (Oct. 13, 2016), <https://www.hillandponton.com/va-benefits-happens-found-incompetent/> [<https://perma.cc/L94W-L6NL>].

⁵ 38 C.F.R. § 3.353(a)–(b).

⁶ *See, e.g.*, U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS & EVALUATIONS, NO. 14-01883-371, *AUDIT OF FIDUCIARY PROGRAM'S MANAGEMENT OF FIELD EXAMINATIONS 2–3* (2015); Benjamin Pomerance & Katrina Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, 23 WIDENER L. REV. 1, 26 (2017) (describing the fiduciary program as a "quagmire," and criticizing it for protracting the fiduciary appointment process (citing *Solze v. Shinseki*, 26 Vet. App. 118, 126 n.13 (2013) (Lance, J., dissenting) (stating that "[the] growing consensus outside of VA [is] that the fiduciary system is broken"))).

⁷ The pronoun "he" is used throughout this Article to refer to the veteran. This is not to discount the service of our women in uniform. However, because men make up approximately 90% of living veterans and for the purpose of simplicity, the pronoun "he" is used. *See* NAT'L CTR. FOR VETERANS ANALYSIS & STAT., U.S. DEP'T OF VETERANS AFFAIRS, *VETERAN POPULATION* (2016), https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/Vetpop_Infographic_Final31.pdf [<https://perma.cc/M6SY-RJXV>].

⁸ U.S. DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL: *PROCESSING AWARDS TO INCOMPETENT BENEFICIARIES*, § B(4)(a) (2018), https://www.kno.wva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014276/M21-1,-Part-III,-Subpart-v,-Chapter-9,-Section-B---Processing-Awards-to-Incompetent-Beneficiaries [<https://perma.cc/K8HB-GARG>] [hereinafter *PROCESSING AWARDS*]; Fast Letter 10-51 (Revised) from the Dep't of Veterans Affairs to all VA Regional Offices and Centers, *Processing Requests for Relief from the Reporting Requirements of the National Instant Criminal Background Check*

reports the veteran to the Department of Justice (DOJ) as someone who has been “adjudicated as a mental defective” and is therefore prohibited from owning a firearm.⁹ Divesting a veteran of his constitutional rights, in a manner that affords fewer protections than other citizens receive, unconstitutionally infringes on the veteran’s Second Amendment rights. This situation is particularly ironic and shameful considering the lasting oath of all who have served in the Armed Forces of the United States to support and defend the Constitution above all else.

Over the past decade, and most recently in 2017, Congress has considered, debated, and periodically passed legislation that would prevent the deprivation of the rights of veterans determined to be “financially incompetent” throughout this process.¹⁰ Both proponents and opponents of such legislation recognize that, while the current process the VA uses to declare a veteran a ‘mental defective’ may inadvertently identify some veterans who are a danger to themselves or others and thus prevent them from obtaining firearms, is the overreaching impact on the constitutional rights of veterans who have never been adjudicated a threat an acceptable trade-off?”¹¹ Congress has decided that this trade-off is undesirable in the Social Security system and has forbidden the Social Security Administration (SSA) from implementing a plan to report incompetent payees to DOJ in a similar manner.¹² This begs the question: Why is this still a permissible practice in the VA?

This Article does not argue that veterans who have been adjudicated mentally incompetent by a court after a hearing or have been involuntarily committed to a mental health facility should be permitted to purchase or possess firearms. However, this Article does compare the VA’s determination of “financial incompetency” to other determinations of “mental defectiveness,” demonstrating that the VA’s standards do not rise to the level of “adjudicat[ing] [the veteran] a mental defective” in a manner sufficient for him to be stripped of his constitutional rights.¹³ This Article also argues that including veterans determined financially incompetent for VA purposes on a list of persons unable to exercise their Second Amendment rights is an unconstitutional deprivation of these rights which must be remedied for all affected veterans, past and future.

Part I of this Article explores VA policies and examines how the VA determines that a veteran is incompetent for financial purposes. Part II discusses gun control

System (Feb. 20, 2014); Patrick Howley, *VA Sends Veterans’ Medical Info to FBI to Get Their Guns Taken Away*, DAILY CALLER (Apr. 21, 2015), <http://dailycaller.com/2015/04/21/va-sends-veterans-medical-info-to-fbi-to-get-their-guns-taken-away/> [<https://perma.cc/B4TM-7GAB>].

⁹ 18 U.S.C. § 922(g)(4) (2018).

¹⁰ See, e.g., Veterans 2nd Amendment Protection Act, H.R. 1181, 115th Cong. (2017) (“To amend title 38, United States Code, to clarify the conditions under which [veterans] may be treated as adjudicated mentally incompetent for certain purposes.”).

¹¹ See, e.g., 163 CONG. REC. H2103–06 (daily ed. Mar. 16, 2017) (statement of Rep. Roe) (“The right to bear arms is too important to deprive veterans of due process without a judicial determination of whether the veteran poses a threat to themselves or others.”).

¹² H.R.J. Res. 40, 115th Cong. (2017) (enacted).

¹³ 18 U.S.C. § 922(g)(4) (2018).

legislation and its effect on the ability of a financially incompetent veteran to possess firearms. Part III applies the VA's process by providing the case-study of a veteran who the VA determined to be financially incompetent. Part IV explores the federal legislation regarding incompetency decisions, including the SSA's proposed rule which would have followed the VA's lead in reporting beneficiaries determined to be financially incompetent, and curing legislation such as the Veterans 2nd Amendment Protection Act. Part V analyzes the constitutional implications of the VA's process. Part VI concludes, emphasizing the need to address this issue and providing some potential avenues of relief for veterans who have already been listed as a prohibited person due to a determination of financial incompetence.

I. THE VA AND FINANCIAL INCOMPETENCY DETERMINATIONS

A. *A General Overview of the VA and Concerns with the Process*

The VA is a cabinet-level federal agency charged with providing benefits and health care to our nation's military veterans.¹⁴ Benefits that veterans¹⁵ may be eligible to receive include educational benefits, pensions for elderly or low-income veterans, and financial compensation for those veterans disabled during their service to the nation.¹⁶ When a veteran is awarded pension or disability compensation benefits, the benefits are granted to the veteran as a nontaxable monthly payment that normally ranges from \$133 to a little over \$3000, depending on the veteran's level of disability as determined by the VA.¹⁷

To qualify for these benefits, a veteran must first file a claim for benefits with the regional office of their local VA—also referred to as the agency of original jurisdiction.¹⁸ Upon receiving a claim the VA will, among other things, request any federal records that might help to prove a veteran's claim, order a medical examination of the claimant to help provide medical proof of a disability, and apply

¹⁴ Press Release, U.S. Dep't of Veterans Affairs, Office of Pub. & Intergovernmental Affairs, VA Observes 10th Anniversary as a Cabinet Department (Mar. 15, 1999), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=145> [<https://perma.cc/3PPA-26NU>]; *About VA: History*, U.S. DEP'T OF VETERANS AFFAIRS., https://www.va.gov/about_va/va_history.asp [<https://perma.cc/9HCL-HZ84>] (last visited Aug. 24, 2018).

¹⁵ While there are benefits that are obtainable by spouses and dependent children of deceased veterans, this article's primary focus is on the benefits provided to veterans themselves. Therefore, the term veteran, as opposed to claimant, will be used in this Article.

¹⁶ *About VBA*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/benefits/about.asp> [<https://perma.cc/A9NC-YBKL>] (last visited Sept. 13, 2018).

¹⁷ *See Veterans Compensation Benefits Rate Tables - Effective 12/1/17*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp [<https://perma.cc/2HA7-JKPL>] (last visited Aug. 24, 2018); *see also* 38 U.S.C. § 5301(a) (2003).

¹⁸ *How to Apply*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation/apply.asp> [<https://perma.cc/ED8G-4EL6>] (last visited Aug. 24, 2018).

a standard of proof that, in theory, is extremely lenient in granting the veteran a benefit.¹⁹ These duties, although foreign in other administrative agency adjudication processes, are hallmarks of the VA which has long been understood to be a “nonadversarial” and “pro-claimant” (i.e., “pro-veteran”) system.²⁰ After gathering and analyzing all this information, the VA will decide the veteran’s claim for benefits.²¹

If the veteran disagrees with the VA’s decision, the veteran has the right to appeal. This appeal is initiated by filing a “notice of disagreement” with the regional office within one year of receiving the VA’s decision.²² Upon receipt of a notice of disagreement, and after review of any new evidence submitted by the veteran, the regional office either agrees with the veteran and issues a new decision or sustains its original decision in a document called the “Statement of the Case.”²³ Upon receiving a Statement of the Case, the veteran has sixty days to appeal to the next level of the agency, the Board of Veterans’ Appeals (the “Board”).²⁴ The Board is where, for the first time in the claims process, a judge within the VA, referred to as a Veterans Law Judge, reviews the veteran’s file and the regional office’s adjudication of that claim.²⁵ If the veteran disagrees with the Board’s decision, the veteran can appeal to the United States Court of Appeals for Veterans Claims (CAVC), an Article I court.²⁶

Three aspects of this appellate process are important for the purposes of this Article: First, the timeline is exceedingly lengthy for a veteran’s claims to be reviewed by a judge within the VA as well as an appellate judge. When a veteran files an appeal of the Statement of the Case, it takes an average of four years from the date of filing the appeal for the Board to render a decision.²⁷ If the veteran’s claims are remanded to the regional office, another 255 days on average is tacked onto this wait.²⁸ If the veteran appeals the Regional Office’s second decision, more time is added to the process.²⁹ Appealing a Board decision to the CAVC can take up to an additional year, and a remand after that can add one to two additional years of

¹⁹ See Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 USC § 5103A (2017).

²⁰ *Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed. Cir. 1998).

²¹ 38 U.S.C. § 7104 (a)–(b) (1996).

²² *Id.* § 7105(b)(1).

²³ 38 C.F.R. § 19.26 (2006).

²⁴ 38 U.S.C. § 7105 (2012).

²⁵ See 38 U.S.C. § 7101(a) (2001); see also *Gateway to VA Appeals, Bd. of Veterans’ Appeals*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.bva.va.gov> [https://perma.cc/Q3Y8-S48H] (last visited Aug. 24, 2018).

²⁶ 38 U.S.C. § 7252(a) (1998).

²⁷ See *BD. OF VETERANS APPEALS, U.S. DEP’T OF VETERANS AFFAIRS, ANNUAL REPORT, FISCAL YEAR 2015* (2015), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf [https://perma.cc/ECM4-SWC3].

²⁸ *Id.*

²⁹ See *id.*

waiting.³⁰ The amount of time this process takes is unreasonable. Any decision made by the regional office, especially an erroneous decision, can negatively affect a veteran for years.³¹

Second, the available data clearly suggests that the VA often makes erroneous decisions. This is demonstrated by the extremely high remand rates both at the Board level and by the CAVC. In fiscal year (FY) 2015, the Board reported that it found error with the decisions of the regional offices in approximately 46.5 percent of the cases it reviewed, and subsequently remanded the claims.³² This is an increase over previous years' remand rates of 43–45 percent.³³ In approximately 31 percent of the cases, the Board outright granted the veterans previously denied claims, without remand to the regional office for further development.³⁴ The CAVC has an even higher remand rate. In FY 2016 it remanded, in whole or in part, approximately 77 percent of the appeals it received from the Board due to error by the Board in its review.³⁵ More tellingly, approximately 87 percent of the cases remanded were awarded Equal Access to Justice Act (EAJA) attorney's fees.³⁶ EAJA fees are awarded in those cases where the veteran was the victorious party on appeal and the CAVC determines that the VA had been holding a position against the veteran that was not substantially justified.³⁷ The high number of veterans' cases where the court decides that the VA takes a position that is not justified against the veteran from the beginning, combined with the already high remand rates, reveal the VA's high propensity to make poor decisions concerning a veteran's claims.

Third, a federal statute prohibits veterans from hiring a lawyer to help them at the initiation of the claims-filing process.³⁸ A veteran may not hire an attorney until the veteran has filed a claim, received a decision from the regional office, and then affirmatively appealed that decision by filing a Notice of Disagreement on his own, or with the help of a veterans service organization (VSO).³⁹ VSOs are nonprofit groups, often made up of veterans themselves, that help veterans file claims at no

³⁰ U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 3 (2016), <https://www.uscourts.cavc.gov/documents/FY2016AnnualReport> [<https://perma.cc/EKY6-A9AR>].

³¹ See generally Daniel L. Nagin, *Goals vs. Deadlines: Notes on the VA Disability Claims Backlog*, 10 U. MASS. L. REV. 50 (2015) (providing a more detailed analysis of the delay within the VA system).

³² See BD. OF VETERANS APPEALS, *supra* note 27, at 26.

³³ Stacey-Rae Simcox, *Thirty Years After Walters the Mission Is Clear, the Execution Is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 708 (2016).

³⁴ See BD. OF VETERANS APPEALS, *supra* note 27, at 28.

³⁵ U.S. COURT OF APPEALS FOR VETERANS CLAIMS, *supra* note 30, at 2.

³⁶ *Id.*

³⁷ See 28 U.S.C. § 2412(d)(1)(A) (2018).

³⁸ See 38 U.S.C. § 5904(c)(1) (2018).

³⁹ See *id.*

cost to the veteran.⁴⁰ These VSOs do not ordinarily provide attorneys to help veterans at the regional office or Board level.⁴¹

Considering the time it takes to appeal erroneous VA decisions, the number of erroneous decisions made, and the significance of not being permitted to have an attorney help with these issues, the impact of a flawed financial incompetency determination by the VA becomes much more detrimental—particularly when that decision deprives a veteran of his constitutional rights.

B. The VA Determination of Financial Incompetence

When issuing an award for veteran's benefits, the VA must review the veteran's ability to manage any funds distributed to that veteran from the VA.⁴² This review, as well as the determination of financial incompetency is completed by the regional office processing the award of benefits, which is housed in the Veterans Benefits Administration.⁴³ These decisions are not reviewed by the Veterans Health Administration, a separate division of the VA which provides medical care to veterans.⁴⁴ While previous medical records are expected to be considered by the regional office when making the determination of financial incompetency, medical providers in the Veterans Health Administration are not individually or specifically

⁴⁰ See 38 C.F.R. § 14.628 (2018); 38 C.F.R. § 14.628 (2018); see also *Veterans Service Organizations*, HOUSE COMM. ON VETERANS' AFFAIRS, <https://veterans.house.gov/resources-for-veterans/veterans-service-organizations.htm> [<https://perma.cc/4XH4-VNAQ>] (last visited Dec. 9, 2018); see also *The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 109th Cong. (2006).

⁴¹ See *The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 109th Cong. (2006).

⁴² 38 C.F.R. § 3.353(b); U.S. DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL: EVALUATING COMPETENCY § A(1)(2) (2018), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014211/M21-1-Part-III-Subpart-iv-Chapter-8-Section-A-Evaluating-Competency?query=m21-1%20part%20iii%20subpart%20iv%20chapter%208#1 [<https://perma.cc/NKX9-WNCG>] [hereinafter EVALUATING COMPETENCY].

⁴³ EVALUATING COMPETENCY, *supra* note 42. See also *Dep't. of Veterans Affairs Organizational Chart*, U.S. DEP'T OF VETERANS AFFAIRS (June 2009), <http://www.va.gov/ofcadmin/docs/vaorgchart.pdf> [<https://perma.cc/PW4V-E93Y>]; *About VBA, Veterans Benefits Administration*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/benefits/about.asp> [<https://perma.cc/A9NC-YBKL>] (last visited Sept. 13, 2018).

⁴⁴ *About VHA, Veterans Health Administration*, U.S. DEP'T OF VETERANS AFFAIRS, <https://www.va.gov/health/aboutVHA.asp> [<https://perma.cc/35JF-5H88>] (last visited Sept. 13, 2018).

consulted about the veteran's competency.⁴⁵ If the veteran filing the benefits claim is also a patient of the Veterans Health Administration, and the medical provider has never had reason to include comments in the patient's records concerning the patient's ability to handle his own finances, then the records are considered silent on the veteran's competency for VA purposes.⁴⁶ This often leaves the medical opinion of the compensation and pension (C&P) examiner as the sole statement in the record regarding financial incompetency. A C&P examination is the medical examination provided by the VA for purposes of adjudicating the veteran's benefits claim.⁴⁷ The C&P examiner is not the veteran's treating physician and is hired by the VA solely to diagnose claimed disabilities and provide medical opinions concerning the etiology of these conditions.⁴⁸ The C&P examiner may also be called upon to determine the competency of a veteran suffering from certain disabilities.⁴⁹

The quality of the C&P examination has been under fire for several years. For instance, from 2009 to 2014, reliance on inadequate C&P examinations was one of the top five reasons decisions appealed to the Board or CAVC were remanded back to the regional offices.⁵⁰ Critics also complain that C&P examiners do not spend

⁴⁵ See generally EVALUATING COMPETENCY, *supra* note 42 (providing that previous medical records should be considered in making the determination, but never including the Veterans Health Administration in the Process).

⁴⁶ See *id.* (stating that a "finding of incompetency cannot be made without a definite expression by a responsible medical authority" unless clear and convincing medical record evidence "that leaves no doubt as to the beneficiary's incompetency" is present).

⁴⁷ 38 U.S.C. § 5103A(d) (2012); 38 C.F.R. 3.159(c)(4) (2016).

⁴⁸ V.A. OFFICE OF INSPECTOR GEN., DEP'T OF VETERANS AFFAIRS AUDIT OF V.A.'S EFFORTS TO PROVIDE TIMELY COMPENSATION AND PENSION MEDICAL EXAMINATIONS 1 (2010); see *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300–01 (2008) (stating that the VA must provide an adequate examination with a reasoned medical explanation for any determinations made); see also U.S. DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES MANUAL: EXAMINATION REPORTS § D(2)(1) (2018), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000015812/M21-1,-Part-III,-Subpart-iv,-Chapter-3,-Section-D---Examination-Reports [<https://perma.cc/YV3T-DNVK>] [hereinafter EXAMINATION REPORTS] (explaining that the VA's examinations require the use of a DBQ, which includes a diagnosis section, medical history, objective findings, results of diagnostic testing performed, and a remarks section for any necessary explanation).

⁴⁹ See, e.g., U.S. DEP'T OF VETERANS AFFAIRS, V.A. FORM 21-0960P-3, REVIEW POST TRAUMATIC STRESS DISORDER (PTSD) DISABILITY BENEFITS QUESTIONNAIRE 6 (2018); U.S. DEP'T OF VETERANS AFFAIRS, V.A. FORM 210960P-2, MENTAL DISORDERS (OTHER THAN PTSD AND EATING DISORDERS) DISABILITY BENEFITS QUESTIONNAIRE 5 (2018); U.S. DEP'T OF VETERANS AFFAIRS, V.A. FORM 21-0960C-9, MULTIPLE SCLEROSIS (MS) DISABILITY BENEFITS QUESTIONNAIRE 6 (2016).

⁵⁰ *Hearing on Pending Legislation, Hearing Before the S. Comm. on Veterans' Affairs*, 114th Cong. 2nd Sess. 104 (2016) (statement of Diane Boyd Rauber, Executive Director, National Organization of Veterans Advocates, citing Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs (Jan. 2015)).

adequate time evaluating veterans for complex mental health conditions.⁵¹ Take, for example, psychological C&P examinations completed for posttraumatic stress disorder (PTSD). Recognizing that the quality of C&P examinations for PTSD were questionable, the Veterans Benefits Administration has published the “Best Practices Manual for Posttraumatic Stress Disorder.”⁵² This guide was intended to help C&P examiners conduct more thorough PTSD examinations by establishing best-practice standards.⁵³ The manual advises that the “Initial PTSD compensation and pension evaluations typically require about three hours, but complex cases may demand additional time.”⁵⁴ Despite establishing that three hours per “noncomplex” PTSD examination is the best practice, C&P examiners are required to conduct anywhere from three to six C&P examinations per day, which includes interviewing the veteran, reviewing the claims file, reviewing the veteran’s entire medical record, and documenting the exam.⁵⁵ It is easy to see how C&P examinations can lack in quality when the best practices established by the Veterans Benefits Administration are not being implemented across the board.

The VA employee tasked with determining whether a veteran is financially incompetent is referred to as the Rating Veterans Services Representative (RVSR).⁵⁶ The RVSR rarely has any special legal training, need not be a medical professional,⁵⁷ is generally a lower-level employee within the VA, and statistically, most likely has been on the job for less than five years.⁵⁸ The RVSR’s job is to, among other things,

⁵¹ Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C. L. REV. 223, 230–33 (2016).

⁵² See PATRICIA WATSON ET AL., U.S. DEP’T OF VETERANS AFFAIRS, BEST PRACTICE MANUAL FOR POSTTRAUMATIC STRESS DISORDER (PTSD) COMPENSATION AND PENSION EXAMINATIONS 1 (2016) (providing information on PTSD and current recommendations regarding best practices for assessing PTSD among veterans).

⁵³ *Id.* at 2.

⁵⁴ *Id.*

⁵⁵ See, e.g., Mark D. Worthen, *Veterans C&P Exams for PTSD and Other Mental Disorders, Six C&P Exams Per Day* (June 9, 2015), <https://ptsdexams.com/six-cp-exams-per-day/> [<https://perma.cc/WM2V-RFKQ>]; USAJOBS, *Clinical Psychologist-Compensation & Pension (C&P)*, <https://www.usajobs.gov/GetJob/ViewDetails/448169000/> [<https://perma.cc/7HVL-79B8>] (last visited Dec. 9, 2018).

⁵⁶ See *Rating Veterans Service Representative*, DEP’T OF VETERANS AFFAIRS, <https://www.vacareers.va.gov/vacareers/job-search/job-detail.asp?job=03a9ac-rating-veterans-service-representative-los-angeles-ca> [<https://perma.cc/D4DA-PWM5>] (last visited Aug. 24, 2018).

⁵⁷ *Id.*

⁵⁸ See *Adjudicating VA’s Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans’ Affairs*, 113th Cong. 44 (2013) (statement of Zach Hearn, Deputy Director for Claims of the American Legion); *Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the*

“[a]ssure proper application of the rating schedule and other applicable instructions.”⁵⁹ The RVSR is also “fully accountable for proper analysis, appropriate development, and final rating determinations.”⁶⁰ If the RVSR determines that the veteran is “unable to manage his or her own financial affairs” the veteran is deemed financially “incompetent” for VA purposes and a fiduciary is appointed to manage the VA’s payment of benefits to the veteran.⁶¹ The determination of incompetency is strictly one of financial incompetence. The RVSR is not required to make a determination that the veteran is a threat to himself or others or make any determination regarding the veteran’s ability to enter contracts or manage his affairs outside the VA’s monetary payment to him.⁶²

1. The Effect of a Judicial Finding of Competence

Determining that a veteran is financially incompetent for VA purposes does not require a court order of incompetency. In fact, the VA has directed RVSRs that they are not bound by any judicial determination of competence.⁶³ The VA’s stance on judicial determinations of competency has created a dichotomy with respect to the effect of judicial proceedings on a veteran’s competency. For instance, if a court has previously declared the veteran incompetent, VA internal guidance dictates that the veteran should not be found competent by the VA unless there is clear and convincing evidence of competency.⁶⁴ Additionally, in cases in which a court has determined the veteran to be incompetent, the VA is not required to provide the veteran with notice that it will propose a determination of financial incompetency, and will instead move right to the determination phase.⁶⁵

On the other hand, if a veteran is found competent by a court, the VA is still free to declare the veteran financially incompetent, but must first notify the veteran of this proposed finding (a process known as “proposal of incompetency”) and allow the veteran to respond.⁶⁶ This proposal of financial incompetency is meant to serve as the veteran’s due process and is referred to as such in internal VA guidance to its employees.⁶⁷

Comm. on Veterans’ Affairs, 111th Cong. 52 (2009) (statement of Ian de Planque, Assistant Director of Veterans Affairs and Rehabilitation Commission for the American Legion).

⁵⁹ See *Rating Veterans Service Representative*, *supra* note 56.

⁶⁰ *Id.*

⁶¹ *What Does VA’s Term ‘Incompetent’ Mean?*, U.S. DEP’T OF VETERANS AFFAIRS, https://iris.custhelp.com/app/answers/detail/a_id/2902/~/%E2%80%99s-term-%E2%80%99Cincompetent%E2%80%99D-mean%3F [https://perma.cc/J2S2-8WC2] (last visited Aug. 24, 2018).

⁶² 38 C.F.R. § 3.353(a)–(b) (2018).

⁶³ EVALUATING COMPETENCY, *supra* note 42, § A(1)(b).

⁶⁴ *Id.* § A(5)(b).

⁶⁵ *Id.* § A(1)(a).

⁶⁶ *Id.*

⁶⁷ *Id.*

2. *The Standard of Proof for Incompetency*

When making a determination that a veteran is financially incompetent, the RVSR must rely on a “definite expression [of incompetence] by the responsible medical authorities.”⁶⁸ In the absence of such expression, the RVSR must find medical evidence in the veteran’s record that proves by “clear and convincing evidence” the veteran’s inability to manage his financial affairs.⁶⁹ The VA’s definition of “clear and convincing” evidence is problematic. While the legal definition of clear and convincing evidence requires the fact finder to believe the evidence is sufficient to make it highly probable that a claim is true, the legal definition also acknowledges that the “finder of fact may still harbor doubts of unlikely bases.”⁷⁰ In contrast, the VA has created its own definition of “clear and convincing” that is more stringent than the regularly used legal definition and has published this definition in the VA’s Adjudication Procedures Manual (the “Manual”), which the RVSRs use to administer the claims process. In the Manual, the VA requires that, in order to find a veteran financially incompetent, the evidence of financial incompetency in a veteran’s record be “clear, convincing, and leave[] *no doubt* as to the beneficiary’s incompetency.”⁷¹ This standard appears again in the companion regulation upon which this portion of the Manual is based.⁷² This direction is clear: To find a veteran financially incompetent, there must be *no doubt* that the veteran is actually financially incompetent. However, the Manual and the regulation also offer contradictory guidance by directing RVSRs to find competence where there is “reasonable doubt” concerning a veteran’s “mental capacity.”⁷³ The VA defines reasonable doubt as “one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the [allegation]. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility”⁷⁴ In other words, if the evidence that a veteran is financially competent is in approximate balance with evidence that the veteran is financially incompetent, the scale will tip in favor of the veteran and he will be presumed competent.⁷⁵

⁶⁸ *Id.* § (A)(1)(d); 38 C.F.R. § 3.353(c).

⁶⁹ See EVALUATING COMPETENCY, *supra* note 42, § (A)(1)(d); 38 C.F.R. § 3.353(c).

⁷⁰ Stephen Michael Sheppard, *Clear and Convincing Evidence (Proof by Clear and Convincing Evidence)*, in THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, (Lexis).

⁷¹ See EVALUATING COMPETENCY, *supra* note 42, § (A)(1)(d); 38 C.F.R. § 3.353(c).

⁷² 38 C.F.R. § 3.353(c). The specific language of this direction follows: “Unless the medical evidence is clear, convincing and leaves no doubt as to the person’s incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.” *Id.*

⁷³ See EVALUATING COMPETENCY, *supra* note 42, § (A)(1)(d); 38 C.F.R. § 3.353(c).

⁷⁴ 38 C.F.R. § 3.102 (2001).

⁷⁵ *Id.*; 38 C.F.R. § 3.353(c) (2018).

There are numerous concerns with the VA's directives requiring its employees to weigh evidence and burdens of proof in determining the competency of a veteran. In one directive, if there is no court finding of incompetence, the VA mandates that there must be "no doubt" that a veteran is financially incompetent in order to find a veteran financially incompetent.⁷⁶ It follows logically from the VA's definition of "clear and convincing" that if there is *any* doubt, the veteran should be presumed competent.⁷⁷ However, the VA then directs that when the evidence of a veteran's competence is in equipoise or raises reasonable doubt, only then does the veteran receive the presumption of competence.⁷⁸ The trouble with these two conflicting directives is exemplified in a case where there are two doctor's opinions indicating that a veteran has the mental capacity to handle his own funds and three that show he does not. Two pieces of evidence favoring a veteran's competence certainly raise doubts that the veteran is truly financially incompetent. Under the definition in the Manual, some doubt exists, and this is enough to presume the veteran competent. However, under the regulation, the evidence is not in equipoise and therefore the scale does not tip the benefit of the doubt toward the veteran. Thus, in this hypothetical situation, the veteran would be found financially incompetent. The standards "no doubt" and "reasonable doubt" are obviously different. Imagine the confusion of a VA employee attempting to reconcile this difference. Add to this the conflicting standard that if a veteran is declared incompetent by a court then the VA should only find competency if there is clear and convincing evidence of competency, which is in sharp contrast to only finding financial incompetence if there is clear and convincing evidence of financial incompetence.⁷⁹ The fact that no other regulation or statute authorizes a similar application of the VA's clear and convincing evidence standard to determine competency deepens the concern over the VA's application of this standard in the process.

Notably, many veterans are navigating this field of "burden of proof" landmines without the benefit of an attorney.⁸⁰ The veteran caught in this web of confusing burdens of proof may be truly behind the eight ball because he cannot hire an attorney to help him sort through the matter. Without an advocate who can make sense of these differing legal standards, the veteran is impaired in his ability to help the VA make the appropriate decision, and the result for a veteran could be extremely detrimental.

3. *The Process of Declaring a Veteran Financially Incompetent*

The process for notifying a veteran that the VA has found him financially incompetent varies, depending upon whether the veteran has previously been

⁷⁶ See EVALUATING COMPETENCY, *supra* note 42, § (A)(1)(d); 38 C.F.R. § 3.353(c).

⁷⁷ *Id.*

⁷⁸ 38 C.F.R. § 3.102 (2001).

⁷⁹ See EVALUATING COMPETENCY, *supra* note 42, § A(5)(b).

⁸⁰ 38 U.S.C. § 5904(c)(2) (2018).

adjudicated incompetent by a court. Veterans previously determined incompetent by the court are not entitled to receive notice that the VA proposes to declare the veteran financially incompetent.⁸¹ In those cases, the VA may immediately declare the veteran financially incompetent.⁸²

As discussed above, the VA's notification requirement varies depending upon whether the veteran has been determined incompetent by a court.⁸³ The VA considers this notification adequate to fulfill any due process requirements that a veteran is entitled to before the VA makes a final financial competency determination.⁸⁴ This notice includes a relatively short summation of the evidence the VA relied upon to determine financial incompetency; an explanation regarding the effect of financial incompetency on payment of awards; a short paragraph that this determination will affect a veteran's right to purchase, own, and possess a firearm; and a list of the rights a veteran has before the final decision is made to declare the veteran incompetent.⁸⁵ The rights a veteran is entitled to exercise in this process include the right to submit evidence of financial competency, request a personal hearing to present evidence of competency, and to have legal representation at this hearing.⁸⁶ A veteran may also present evidence of competency, which may include medical opinions from physicians or mental health professionals showing that the veteran is indeed competent to manage his own financial benefits.⁸⁷ The veteran then has sixty days to respond to the notice of proposed financial incompetency before the determination is made final.⁸⁸

4. *The Effects of Declaring a Veteran Incompetent for VA Purposes*

When the VA declares a veteran financially incompetent for VA purposes, two major consequences occur: First, the VA appoints a fiduciary to manage the veteran's funds for them.⁸⁹ This fiduciary is not an employee of the VA and is usually either a volunteer or a paid fiduciary.⁹⁰ The VA will consider family members to serve as fiduciaries first. In the event none are capable or willing to do so, a paid fiduciary will be appointed.⁹¹ The fiduciary must ensure that the funds the veteran receives from the VA are used to serve the veteran's needs. The fiduciary's

⁸¹ See EVALUATING COMPETENCY, *supra* note 42, § A(1)(a).

⁸² *Id.*

⁸³ See discussion *infra* Section I.B.2.

⁸⁴ PROCESSING AWARDS, *supra* note 8, § B(3).

⁸⁵ *Id.* § B(3)(a).

⁸⁶ 38 U.S.C. § 5501A (2016).

⁸⁷ *Id.* § 5501A(3).

⁸⁸ 38 C.F.R. § 3.103(b)(2) (2018).

⁸⁹ 38 U.S.C. § 5502(a)(1) (2005).

⁹⁰ *Id.* § 5502(a).

⁹¹ *Id.*; 38 C.F.R. § 13.58(a) (2018); U.S. DEP'T OF VETERANS AFFAIRS PENSION & FIDUCIARY SERV., A GUIDE FOR V.A. FIDUCIARIES (2013), http://benefits.va.gov/fiduciary/Fid_Guide.pdf [<https://perma.cc/RZV9-4DCD>].

management of those funds is subject to audit for compliance with this standard.⁹² While the fiduciary program has been rife with complaints of abuse for several years and has been the subject of many congressional inquiries and internal reports,⁹³ these issues fall outside the scope of this Article.⁹⁴ This Article focuses on the secondary—and often overlooked—result of a declaration of financial incompetency: The VA reports these veterans to the Federal Bureau of Investigation (FBI) as persons prohibited from possessing, owning, or purchasing a firearm. Part II discusses the mechanics of this process.

II. FEDERAL FIREARMS LAW: PROHIBITED PERSONS AND THE NICS LIST

A. Becoming a Prohibited Person Under Federal Law and the Meaning of a “Mental Defective”

An attempt to control access to firearms at the federal level often occurs in response to a crisis event. The broadest and most effective attempt to prohibit certain people from shipping, transporting, possessing, or receiving firearms and ammunition appeared in the Gun Control Act of 1968,⁹⁵ which categorized certain individuals as prohibited persons.⁹⁶ Prohibited persons included, among other categories, persons who were convicted of crimes punishable by over one year in prison,⁹⁷ persons who use or are addicted to a controlled substance,⁹⁸ and those “who [have] been adjudicated as a mental defective or who [have] been committed to a mental institution.”⁹⁹

⁹² 38 C.F.R. § 13.58(b)(2) (1975).

⁹³ See, e.g., *Legion urges Congress to re-evaluate fiduciary programs*, AM. LEGION (June 17, 2015), <https://www.legion.org/veteransbenefits/228250/legion-urges-congress-re-evaluate-fiduciary-programs> [<https://perma.cc/CJ8B-DWA9>] (discussing findings by the American Legion regarding the inefficiencies plaguing the VA’s fiduciary program, including significant backlogs in adjudication, burdening family members, and stripping away the constitutional rights of veterans).

⁹⁴ There are many excellent articles outlining the problems in the fiduciary system. E.g., Whitney Bosworth Blazek, *Combating Privatization: Modifying the Veterans Administration Fiduciary Program to Protect Incompetent Veterans*, 63 DUKE L.J. 1503 (2014).

⁹⁵ Gun Control Act of 1968, Pub. L. No. 90–618, § 922(g), 82 Stat. 1213, 1220 (1968) (also known as the Federal Gun Control Act and the Safe Streets Act of 1968).

⁹⁶ EDWARD C. LIU, CONG. RESEARCH SERV., R43040, SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 1 (2013).

⁹⁷ 18 U.S.C. § 922(g)(1) (2005).

⁹⁸ *Id.* § 922(g)(3).

⁹⁹ *Id.* § 922(g)(4). The other categories of prohibited persons in this section include: (1) those convicted of crimes punishable by imprisonment for a term exceeding one year; (2) fugitives from justice; (3) unlawful users or drug addicts; (4) illegal aliens; (5) dishonorably discharged veterans; (6) those who renounce United States citizenship; and (7) those subject to a court order regarding domestic violence. *Id.*

In recent years, the definition of a “mental defective” has come to the forefront of the gun debate as the public attempts to understand how mass murderers have access to firearms.¹⁰⁰ The questions these situations raise about how a person is determined to be a “mental defective” are the backdrop to any current discussion of the subject of gun control.

While § 922(g) presumes that a person who has been committed to a mental institution is prohibited from owning a firearm, much of the case law surrounding § 922(g)(4)’s “mental defective” proscriptions revolves around defining the term “committed to a mental institution.”¹⁰¹ The phrase “adjudicated as a mental defective” is unclear, and there is little case law to aid in understanding it.

To more fully understand the implementation of the meaning of “adjudicated as a mental defective,” one must turn to the regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE)—the law enforcement arm of the DOJ tasked with stopping the illegal trafficking of firearms.¹⁰² Specifically, BATFE has determined that “adjudication as a mental defective” requires a “determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.”¹⁰³ Included in this definition are defendants found mentally insane in a criminal court proceeding and those who cannot stand trial or are found not guilty due to lack of mental

¹⁰⁰ For instance, in 2012, Adam Lanza, who in retrospect demonstrated some type of mental illness, stole the firearms he used in the Sandy Hook Elementary massacre. *See SARAH HEALY EAGAN ET AL., REP. OF THE OFFICE OF THE CHILD ADVOCATE, SHOOTING AT SANDY HOOK ELEMENTARY SCHOOL* (2014), <http://www.ct.gov/oca/lib/oca/sandyhook11212014.pdf> [<https://perma.cc/VPZ2-SHMQ>]; James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES, Dec. 14, 2012, <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html> [<https://perma.cc/QUH7-YVAB>]. In another tragic instance, despite Cho Seung-Hui having been found by a court to be an “imminent danger to himself” due to mental illness, he was not reported to the NICS list because he was ordered to out-patient counseling. Cho later legally purchased firearms which he used to kill 32 people on the campus of Virginia Tech in 2007. *See Campus killer’s purchases apparently within gun laws*, CNN (Apr. 19, 2007), http://www.cnn.com/2007/US/04/19/gun.laws/index.html?_s=PM:US [<https://perma.cc/526J-5DE6>].

¹⁰¹ Commitment in these cases includes involuntary commitment, but not admission for observation or voluntary admission to a mental institution. *See* 27 C.F.R. § 478.11 (2018) (“Committed to a mental institution.”). These cases are not the focus of this Article, as these persons are likely reported to the NICS list through other means than the VA fiduciary program.

¹⁰² BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/> [<https://perma.cc/75D7-Y4LJ>]. The BATFE is also commonly referred to as the “ATF” though this Article uses the designation BATFE.

¹⁰³ 27 C.F.R. § 478.11(a) (2018).

responsibility in military courts-martial.¹⁰⁴ The BATFE's final rule regarding the implementation of this regulation noted that in 1997, the VA interpreted the phrase "adjudicated as a mental defective . . . [due to the inability to] manage his or her own affairs" to include those veterans the VA determined were unable to manage their benefit payments.¹⁰⁵

The VA's interpretation leads to undesirable situations as the Congressional Research Service points out:

This regulatory definition of a "mentally incompetent person" does not include any consideration of whether the person is considered to have a propensity for violence or is considered a threat to himself or herself or others. Thus, for example, a veteran who during the determination process for Veterans Disability Compensation (VDC) indicates that because of a traumatic brain injury he is experiencing some short-term memory loss which affects his ability to manage his finances, could be determined to be "mentally incompetent" even if there is no evidence that this veteran's condition would impair his ability to safely own or handle a firearm or that he is a threat to himself or others.¹⁰⁶

No court has examined whether a determination by a VA employee regarding financial incompetency meets the requirement of a "determination by a court, board, commission, or other lawful authority."¹⁰⁷

Few courts have made findings regarding whether "a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease . . . [l]acks the mental capacity to contract or manage his own affairs."¹⁰⁸ Generally, the phrase "adjudicated a mental defective" and its accompanying regulatory definition "lacks the mental capacity to contract or manage his own affairs" have been viewed as being related to someone who is mentally ill or has been found unfit by a trial court.

For instance, in *Tyler v. Hillsdale City Sheriff's Department*, the Sixth Circuit presumed that those who have been "adjudicated a mental defective" are mentally ill.¹⁰⁹ Similarly, in *Keyes v. Lynch*, the U.S. District Court for the Middle District of Pennsylvania presumed that both those "adjudicated as mental a defective" and those "committed" were within the category of persons considered "mentally ill."¹¹⁰

¹⁰⁴ *Id.* § 478.11(b).

¹⁰⁵ Definitions for the Categories of Persons Prohibited From Receiving Firearms, 62 Fed. Reg. 34634, 34637 (June 27, 1997) (codified at C.F.R. T. 27, ch. I, subch. M, pt. 178).

¹⁰⁶ CONG. RESEARCH SERV., R44818, GUN CONTROL, VETERANS BENEFITS, AND MENTAL INCOMPETENCY DETERMINATIONS 12 (2017).

¹⁰⁷ 27 C.F.R. § 478.11(a) (2014).

¹⁰⁸ *Id.*

¹⁰⁹ *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 317 (6th Cir. 2014), *rehearing en banc granted, vacated*, (Apr. 21, 2015).

¹¹⁰ *Keyes v. Lynch*, 195 F. Supp. 3d 702, 719–20 (M.D. Pa. 2016).

In the Fourth Circuit, a judicial determination that a defendant was “mentally incompetent to the extent that she is unable to understand the nature and consequences of the proceeding against her or to assist properly in her defense” met the definition of “adjudicated as a mental defective” because she “lacks the mental capacity to contract or manage her own affairs.”¹¹¹ The Ninth Circuit also affirmed a U.S. District Court decision that the appellant was “adjudicated as a mental defective” when an Arizona court found him unable to assist in his own defense and subsequently appointed the appellant a guardian and a conservator.¹¹²

The definition of “adjudicated as a mental defective” in the context of inability to manage one’s financial affairs has not been reviewed by the courts in detail. However, further discussion of constitutional law issues surrounding the VA’s policy of reporting financially incompetent veterans as mental defectives and exploration of the Social Security Administration’s similar proposal to do so sheds light on the legitimacy of the VA’s interpretation of BATFE’s regulation.

B. Financially Incompetent Veterans Become Prohibited Persons

In response to the shooting of President Ronald Reagan and his assistant James Brady in a botched assassination attempt in 1981, Congress enacted the Brady Handgun Violence Prevention Act of 1993 (the “Brady Act”).¹¹³ The Brady Act required the U.S. Attorney General to create a computerized database of those persons who were disqualified under the Gun Control Act of 1968.¹¹⁴ This database is the National Instant Criminal Background Check System (NICS).¹¹⁵ The Brady Act also required that purchasers of firearms from federal firearms licensees (FFLs) pass a background check.¹¹⁶ FFLs are people or businesses who manufacture, import, or deal in firearms or ammunition under a federally required license to engage in such activity.¹¹⁷ When a person seeking to purchase a firearm does so from an FFL, the FFL is required to contact the NICS system in order to determine if the purchaser may be a prohibited person.¹¹⁸ Requiring a background check will, in theory, allow firearm retail sellers to identify people who are prohibited from owning or possessing a firearm.¹¹⁹ If the purchaser passes the background check, the

¹¹¹ *United States v. White*, 620 F.3d 401, 420 n. 27 (4th Cir. 2010).

¹¹² *Petramala v. U.S. Dep’t of Justice*, No. CV 10-2002-PHX-FJM, 2011 WL 3880826, at *1 (D. Ariz. Sept. 2, 2011), *aff’d*, 481 F. App’x 395 (9th Cir. 2012).

¹¹³ *Brady Bill Signed Into Law*, HISTORY (Aug. 21, 2018) <https://www.history.com/this-day-in-history/brady-bill-signed-into-law> [https://perma.cc/J8FX-ANGH].

¹¹⁴ Brady Handgun Violence Prevention Act, Pub. P.L. 103-159 §103(b), 107 Stat. 1536, 1541 (1994) (codified as amended at 18 U.S.C. § 925A (2018)).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 18 U.S.C. § 922(a) (2005); 18 U.S.C. § 923(a) (2004).

¹¹⁸ 18 U.S.C. § 922(t) (2005); 27 C.F.R. § 478.102 (2018).

¹¹⁹ EDWARD C. LIU ET AL., CONG. RESEARCH. SERV. R43040, SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 1 (2013).

transaction may be completed.¹²⁰ If the purchaser is flagged as a person prohibited from owning firearms, the FFL must refuse to sell the purchaser a firearm.¹²¹

The background check primarily uses information found within the NICS. The NICS system is maintained by the FBI, which is an arm of the DOJ.¹²² The FBI, BATFE, and local and state law enforcement agencies cooperate to maintain the database.¹²³ NICS draws its data from federal databases and other criminal databases in order to populate the list of prohibited persons.¹²⁴

In order to facilitate the NICS's access to information that may indicate a person is prohibited from purchasing or possessing firearms, the Brady Act further directs that the Attorney General "may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would" be a violation of federal law.¹²⁵ Once such a request from the Attorney General is received, the agency must respond with the requested records.¹²⁶ It is under this provision of the Brady Act that the DOJ required the VA report any persons of whom the VA is aware may be prohibited from owning firearms under the provisions of the Gun Control Act of 1968.¹²⁷

In a 2012 memorandum of understanding between the two agencies, the VA agreed to provide to the DOJ for inclusion in the NICS database the names of "VA beneficiaries who cannot manage their VA benefits, have been rated 'incompetent,' and require the appointment of a fiduciary to help manage their VA funds."¹²⁸ These names are then included in the NICS database as persons prohibited from possessing or purchasing firearms and ammunition under the provisions of 18 U.S.C. § 922(g)(4) as persons who have "been adjudicated as a mental defective."¹²⁹

Even before the memorandum of understanding between the agencies was formally agreed upon, the VA reported financially incompetent veterans to the DOJ. This process began in November 1998 when the VA provided over 88,000 names of veterans declared financially incompetent for VA purposes to include in the NICS database.¹³⁰ The VA's contribution to the NICS since that time has increased. By December 2016, "federal departments and agencies had contributed 173,083 records

¹²⁰ 18 U.S.C. § 922(t) (2005).

¹²¹ *Id.*

¹²² LIU ET AL., *supra* note 119, at 1.

¹²³ *Id.* at 5.

¹²⁴ CONG. RESEARCH SERV., *supra* note 106, at 1.

¹²⁵ Brady Handgun Violence Prevention of Act, Pub. P.L. 103-159 §103(e)(1), 107 Stat. 1536, 1542(1994) (codified as amended at 18 U.S.C. § 925A (2018)).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ PROCESSING AWARDS, *supra* note 8.

¹²⁹ 18 U.S.C. § 922(g)(4) (2005).

¹³⁰ WILLIAM J. KROUSE, CONG. RESEARCH SERV., GUN CONTROL LEGISLATION 104 (2012).

in the NICS index 'adjudicated mental health' file, of which the VA contributed 167,815 (98.1%)” of the records.¹³¹

While there was some resistance amongst gun rights groups and within veterans' circles in the aftermath of the 1998 release of names from the VA to DOJ, the majority of the media and American public were silent until the enactment of the NICS Improvement Amendments Act of 2007 (NIAA).

C. Due Process and Codification of the ATF Regulations

The NIAA was Congress's attempt to ensure that the names being submitted to the NICS database and thus preventing the possession or purchase of firearms were more accurate, particularly regarding those who had been “adjudicated as a mental defective.”¹³² The NIAA requires that anyone adjudicated mentally defective for the purposes of NICS reporting also be given the opportunity to be heard by a court, board, commission, or other lawful authority.¹³³ The law also permits persons adjudicated mentally defective to apply for relief from the firearms prohibitions.¹³⁴

During the enactment of the NIAA, some gun rights activists feared that the amendments would make it easier for the FBI to include veterans on the NICS list because it codified the BATFE regulations—which allowed a “court, board, commission, or other lawful authority” to decide mental defectiveness—and the regulations broadened the initial language in the 1968 Gun Control Act that set forth who could adjudicate mental defectiveness.¹³⁵ Opponents of the NIAA voiced concern that this would allow a VA psychiatrist who diagnosed a veteran as being of some slight harm to himself or others to be considered an appropriate “lawful authority” and the diagnosis to be an adjudication that would qualify for inclusion on the NICS list of prohibited persons.¹³⁶ The Congressional Research Service notes that while these concerns have not yet been realized, the codification does give the VA some basis to allow a low-level employee at the regional offices to determine financial incompetency if they indeed qualify as a “lawful authority.”¹³⁷

¹³¹ CONG RESEARCH SERV., *supra* note 106, at ii.

¹³² NICS Improvement Amendments Act of 2007. Pub. L. 110-180 §101(c), 121 Stat. 2559, 2562–64 (2007) (codified at 34 U.S.C. § 40903 (2017)).

¹³³ *Id.* at 101(c)(1)(C).

¹³⁴ *Id.*

¹³⁵ Larry Pratt, *Veterans Disarmament Act to Bar Vets From Owning Guns*, GUN OWNERS OF AMERICA (Oct. 7, 2008), <https://www.gunowners.org/op0751-htm.htm> [<https://perma.cc/CN35-MAYX>]; Nat'l Ass'n for Gun Rights, *New U.S. Senator Opposing H.R. 2640, and a Detailed Rebuttal of the NRA's Defense of Gun Control*, FREE REPUBLIC (Oct. 10, 2007), <http://www.freerepublic.com/focus/f-news/1912813/posts> [<https://perma.cc/8H4V-9PZ6>].

¹³⁶ National Association for Gun Rights, *New U.S. Senator Opposing H.R. 2640, and a Detailed Rebuttal of the NRA's Defense of Gun Control*, FREE REPUBLIC (Oct. 17, 2007), <http://www.freerepublic.com/focus/f-news/1912813/posts> [<https://perma.cc/8H4V-9PZ6>].

¹³⁷ KROUSE, *supra* note 130, at 103.

D. Appealing for Relief from Mental Defect Disability

The NIAA also required that any federal agency making an adjudication of incompetency provide mechanisms for those declared incompetent to appeal for relief from the disability.¹³⁸ While a veteran declared financially incompetent may appeal the incompetency decision through the normal VA channels (i.e., by filing a Notice of Disagreement, then appealing to the Board and subsequently to the CAVC), the VA also created a separate process to comply with the NIAA by which a veteran may seek relief from being reported to the NICS list under the provisions of 18 U.S.C. § 922(g)(4) as a “mental defective.”¹³⁹ If the veteran is able to prove that he is financially competent, the VA notifies the veteran that he is being found competent to manage his VA benefits and sends a request to DOJ to remove the veteran from the NICS list.¹⁴⁰ The VA’s internal procedures manual indicates that the DOJ takes approximately two months from receipt of the VA’s request to remove the veteran from the NICS list.¹⁴¹ If the veteran remains financially incompetent for VA purposes but wants to appeal for relief from the disability that put them on the NICS list, the VA notifies the veteran that he must provide “clear and convincing evidence [that] shows the circumstances regarding your disability and your record and reputation are such that you are not likely to act in a manner dangerous to yourself or others, and the granting of relief is not contrary to public safety and/or the public interest.”¹⁴² Within thirty days of this notification, the veteran must provide the VA with a statement from a mental health provider who can assess the veteran’s mental health over the previous five years and addresses the issue of whether the veteran currently or in the future may present a danger to himself or others.¹⁴³ The veteran must also present medical evidence concerning his mental health symptoms and his likelihood of dangerousness.¹⁴⁴ In addition to these items, the veteran must provide the VA evidence of his reputation by asking character witnesses to provide statements demonstrating that the veteran does not have a reputation for violence and that allowing the veteran to have access to weapons is not contrary to the public interest.¹⁴⁵ Finally, the veteran must provide consent for the VA to request his criminal history.¹⁴⁶ If the veteran has been found competent by a court, board, or commission, that evidence may also be provided to the VA, but it is not required.¹⁴⁷ The decision to provide relief from the disability is made by a

¹³⁸ NICS Improvement Amendments Act of 2007. Pub. P.L. 110-180 §101(c)(2)(A), 121 Stat. 2559, 2563 (2007) (codified at 24 U.S.C. § 40903 (2017)).

¹³⁹ PROCESSING AWARDS, *supra* note 8, § B(4)(h).

¹⁴⁰ *Id.* § B(4)(d)(13).

¹⁴¹ *Id.* § B(4)(d)(15).

¹⁴² *Id.* § B(4)(e).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

line-level VA employee and must be approved by a supervisory employee and the Veteran Service Center Manager.¹⁴⁸ Decisions to deny relief may be appealed to a federal district court because these decisions are not considered to be related to the delivery of VA benefits.¹⁴⁹

III. A REAL-LIFE VA DETERMINATION OF FINANCIAL INCOMPETENCY

It is instructive at this point to review the facts in a case where the VA found a veteran financially incompetent, and then reversed its decision, in order to understand the efficacy of VA determinations. In the course of representing clients while directing a law school veterans clinical program, the author met JR.¹⁵⁰ JR was an Iraq war veteran and in his mid-twenties when he was medically retired from military service due to PTSD and a traumatic brain injury (TBI). In 2009, the VA awarded him a rating of 100 percent disability for his PTSD condition. He was also awarded a 10 percent rating for the mild TBI. Three years after these decisions, in 2012, the VA regional office conducted a review of JR's 100 percent rating for PTSD. The VA sent JR to a C&P examination in March 2012, conducted by a psychologist who had not previously met JR. The C&P examiner only spent one-hour interviewing JR and his wife. In the examiner's evaluation, he noted:

As a result of the TBI, [JR] becomes easily confused, forgets to pay bills, and to comprehend and understand statements, at times. His wife has been handling all of the finances. The veteran requires help with managing financial affairs due to his memory problems and lingering brain injury effects. Both his wife and the [patient] agree that his frustration tolerance is very low and that he can become easily frustrated with financial statements if he has difficulty comprehending them. Once frustrated, he is unable to calm himself easily. Once calmer, he is more able to understand the financial issue. As a result, both of them need to manage his financial affairs at this time. This is the reason for stating that he is not capable of solely handling his finances.¹⁵¹

¹⁴⁸ *Id.* § B(4)(g).

¹⁴⁹ *Id.*

¹⁵⁰ JR is a pseudonym for a real client. The facts as recited in this article are accurate, only the client's name has been altered. Additionally, the client gave permission for all documents associated with his case and this article to be used in an effort to help the public better understand the nature of how these decisions are made. *See* Email from JR to Stacey-Rae Simcox authorizing use of document (on file with the author).

¹⁵¹ Review Post Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire (Mar. 2012) (on file with the author).

Based upon this statement by the medical examiner, in May 2012, the VA regional office notified JR that it proposed to declare him financially incompetent for VA purposes.¹⁵² The VA based its finding on a “definite expression [of incompetence] by [a] responsible medical authorit[y]”.¹⁵³

During your VA examination on March 6, 2012 the examiner stated that you are not capable of handling your financial affairs on the basis that you become easily confused and frustrated, forgets [sic] to pay bills, and have a hard time comprehending and understanding statements. Your wife is currently handling all of the finances. Since there is a definitive finding of incompetency by a physician in this case, and you are not shown to be able to manage personal affairs to include disbursement of funds, we propose to make a determination of incompetency for VA purposes.¹⁵⁴

With this proposal, the VA included a cover letter explaining JR’s rights in the process of a financial incompetency determination.¹⁵⁵ With regards to applying for relief from the disability in order to avoid being reported to the DOJ’s NICS list, the VA gave JR this advice in the letter:

If we decide that you are unable to handle your VA funds, you may apply to this regional office for the relief of prohibitions imposed by the Brady Act with regards to the possession, purchase, receipt, or transportation of a firearm. Submit your request to the address at the top of this letter on the enclosed VA Form 21-4138, *Statement in Support of Claim*. VA will determine whether such relief is warranted.¹⁵⁶

The letter did not instruct JR that he would be required to submit a doctor’s statement covering the previous five years of his mental health and providing an opinion that he is not a threat to himself or others, character witness statements, or any of the other evidence necessary to demonstrate by clear and convincing evidence that he is not a dangerous person.¹⁵⁷

In response to the notification, JR submitted two documents to the VA in July 2012 to rebut the finding that he was financially incompetent to handle the VA benefits. The first was his own statement disagreeing with the C&P examiner’s conclusions that JR was easily confused and failed to pay bills. JR explained that his

¹⁵² See Letter from Veterans Service Center Manager, Dep’t of Veterans Affairs, to JR (May 22, 2012) (on file with the author).

¹⁵³ 38 C.F.R. § 3.353(c) (2018); EVALUATING COMPETENCY, *supra* note 42, § 1(d).

¹⁵⁴ Letter from Veterans Service Center Manager, Dep’t of Veterans Affairs, to JR (May 22, 2012) (on file with the author).

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; 38 C.F.R. § 3.353(c) (2018).

wife paid the bills in their household out of convenience and that he routinely made and accounted for regular and unexpected expenditures of money.¹⁵⁸

The second statement submitted was written by JR's wife. She explained that JR's PTSD had the effect of making him hyperaware of every expenditure the family made, causing JR to pore over financial statements for hours to reconcile any issues in the budget.¹⁵⁹ Specifically, JR's wife noted that:

[JR] can tell me without any issue exactly how much something should cost. We had our car windshield replaced recently, and [he] caught an accidental overcharge which saved us over \$100 dollars. He has also corrected the coffee shop accidentally double-charging a cup of coffee, something even our credit card company missed. [JR] has no trouble handling money during routine and non-routine transactions.¹⁶⁰

JR also attempted to obtain a statement from his VA psychologist regarding competency, which took several months. In the author's experience, this is not an abnormal occurrence (if a veteran is able to obtain a statement at all).

Despite JR's and his wife's statements, in October 2012 the VA regional office notified JR that he had been declared financially incompetent and began the process of appointing his wife his fiduciary.¹⁶¹ At this time, JR was also advised that he was being placed on the NICS list of prohibited persons. In making this determination, the VA regional office failed to consider the statements of JR and his wife and relied on the medical examiner's statement explaining:

[T]he examiner stated that you are not capable of handling your financial affairs on the basis that you become easily confused and frustrated, forgets [sic] to pay bills, and have a hard time comprehending and understanding statements. Your wife is currently handling all of the finances.¹⁶²

JR, through his pro bono counsel, formally appealed this decision. Along with his appeal of the finding of financial incompetency, in November 2012, JR was finally able to provide a letter from his regular treating VA psychologist, "Dr. M."¹⁶³ Dr. M had held approximately thirty treatment sessions with JR up to that point. Dr. M focused his opinion on whether JR's behavior posed a threat to the safety of himself

¹⁵⁸ See Letter from JR to Dep't of Veterans Affairs (June 26, 2012) (on file with the author).

¹⁵⁹ See Letter from JR's Spouse to Dep't of Veterans Affairs (June 26, 2012) (on file with the author).

¹⁶⁰ *Id.*

¹⁶¹ Letter from Veterans Service Center Manager, Dep't of Veterans Affairs, to JR (Oct. 1, 2012) (on file with the author).

¹⁶² *Id.*

¹⁶³ Letter from Dr. M, Staff Psychologist, Dep't of Veterans Affairs (Nov. 26, 2012) (on file with the author).

or others. Dr. M unequivocally stated he had no reason to believe JR would harm himself or others:

Like many returning Veterans with issues of war related stress and physical injuries from combat military service, [JR] has occasionally expressed frustration over certain issues. However, even in cases where his temper has been triggered, he has never, to my knowledge, mishandled his anger through aggression or threats of harm to self or others. He has, in fact, shown good problem solving and redirected his energy into problem-solving efforts that have shown good results in most instances. He has shown good frustration tolerance, coping skills, and resiliency in the face of the challenges of adjusting to civilian life.¹⁶⁴

Dr. M went on to discuss in one sentence JR's ability to handle his own finances: "In my medical opinion. Mr. [JR] is competent to act as his own fiduciary agent and does not need to be subjected to the additional stress that appointment of a financial caregiver would entail."¹⁶⁵

In November 2013, eleven months after receiving Dr. M's statement, the VA determined that JR was indeed competent.¹⁶⁶ In this decision, the VA spent considerably more time evaluating the C&P examiner's opinion contrasting it with the opinion of Dr. M:

[T]he VA contracted examiner who, while he had the benefit of reviewing all evidence of record, saw you on just one occasion for the purpose of a VA mental health exam. Further, the VA contracted examiner explained his reason for concluding that you were not "solely" competent to manage your financial matters and that you worked with your spouse in this area. It was not due to the fact that you weren't mentally competent to understand your finances; it was that you often grew frustrated with these matters and then had to go through a period of calming before you could continue.¹⁶⁷

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ During the time that JR was declared incompetent, he contacted another counsel in order to begin collecting evidence to submit to the VA regarding his appeal for relief from the disability that placed him on the NICS list. The VA did not make a decision on this issue, but instead found JR to be competent which negated the issue of appealing for relief. Letter from Veterans Service Center Manager, Department of Veterans Affairs, to JR (Nov. 15, 2013) (on file with the author).

¹⁶⁷ Letter from Veterans Service Center Manager, Department of Veterans Affairs, to JR (Nov. 15, 2013) (on file with the author).

The VA continued:

The examiner documented that both you and your wife agreed that you have a low frustration tolerance and can become easily frustrated with financial statements. Once frustrated, you found it difficult to calm yourself. However, once you are able to calm down, this examiner noted you are more able to understand the financial issue. As a result, both you and your wife work to manage financial issues. The examiner concluded that this is the reason he found you not capable of “solely” handling your finances.¹⁶⁸

In this decision, the VA rating official implements an odd “solely capable” standard, which appears to interpret the standard to require that JR must be the only person handling his finances in order to be found competent. Admittedly, the meaning of this new “solely capable” standard is difficult to discern as it does not exist in statute, regulation, or case law.

Several issues are worth mentioning concerning the totality of the VA’s decisions regarding financial incompetency in JR’s case. First, the decision to find JR financially incompetent was based upon the wrong standard. The RVSR explaining the reason for the financial incompetency decision appears to fail to comprehend that a declaration that a veteran is unable to handle his own financial affairs requires either a “definite expression [of incompetence] by a responsible medical authority” or evidence that is “clear, convincing, and leaves *no doubt* as to the person’s incompetency.”¹⁶⁹ Neither was present in this case. The RVSR here admits that the finding of financial incompetency was not based upon JR’s inability to understand his finances. Instead, the RVSR and the examining medical provider determined that JR was financially incompetent because he expressed frustration with paying bills and needed to take a break before he could continue. Indeed, this hardly seems proof that JR lacked the ability to handle his own finances. By this standard it seems most Americans would be financially incompetent for VA purposes.¹⁷⁰ Additionally, the finding of financial incompetency was based upon the fact that his wife sometimes handles the finances as well, which was proof that JR

¹⁶⁸ *Id.*

¹⁶⁹ 38 C.F.R. § 3.353(c) (2018); EVALUATING COMPETENCY, *supra* note 42, § 1(d) (emphasis added).

¹⁷⁰ Numerous online sources discuss the link between finances and stress. See Sophie Bethune, *Money Stress Weighs on Americans’ Health*, AM. PSYCHOL. ASS’N (2015) <http://www.apa.org/monitor/2015/04/money-stress.aspx> [<https://perma.cc/6F3E-LWP6>] (“For the majority of Americans (64 percent), money is a somewhat or very significant source of stress . . .”). Other sources suggest that when faced with anxiety, taking time to calm one’s self is the suggested way of appropriately processing the anxiety. See Alex Lickerman, *Taking a Break: Why Breaks Make Us More Resilient*, PSYCHOL. TODAY (2011) <https://www.psychologytoday.com/blog/happiness-in-world/201110/taking-break> [<https://perma.cc/6DH7-YHLX>].

was not “solely” handling his finances. But there is no requirement that the veteran handle his finances alone in order to be competent.¹⁷¹ None of the reasons provided by the VA for declaring JR financially incompetent meet the standards required. Yet, the RVSR did declare JR financially incompetent and, as a result, JR was reported to the NICS list and lost his constitutionally protected right to possess firearms.

Second, the VA’s decision that JR was “restored to competency” was not based upon the actual evidence JR provided the VA regarding his competency to handle his financial affairs. Specifically, the VA failed to even mention the July 2012 statements of JR and his wife demonstrating JR’s ability to pay bills, etc.¹⁷² Instead, the VA relied solely on the statement of Dr. M, which noted in one sentence that JR was competent to act as his own fiduciary. The VA also noted that it decided JR was competent because Dr. M described that “while [JR] [does] or [has] become frustrated with certain aspects of daily living, [JR] [has] developed problem-solving skills that have allowed [JR] to work through [his] frustration to allow [him] to fully comprehend and complete these actions.”¹⁷³ A well-recognized example of these coping mechanisms is one of the reasons that the VA declared JR financially incompetent in the first place: When he gets frustrated, he takes time to calm himself before returning to his task.¹⁷⁴

Third, while the VA eventually declared JR “restored to competency” and removed him from the fiduciary system, a black cloud still followed him. The VA’s competency determination made no mention of its subsequent effect on JR’s right to purchase, transport, or possess a firearm—a subject the VA is required to address when competency is restored.¹⁷⁵ JR had to affirmatively determine that his name had been removed from the FBI-maintained list of prohibited persons—a process that took months and required the help of a second attorney who regularly dealt with NICS legal issues. Additionally, although the VA eventually believed JR’s “competency [was] restored,”¹⁷⁶ if JR is ever asked if he has ever been found incompetent he may have to disclose his one year of “financial incompetency for

¹⁷¹ See 38 C.F.R. § 3.353(c) (2018); EVALUATING COMPETENCY, *supra* note 42, § 1(d).

¹⁷² Letter from Veterans Service Center Manager, Dep’t of Veterans Affairs, to JR (Nov. 15, 2013) (on file with the author).

¹⁷³ *Id.*

¹⁷⁴ Taking a calming break in the face of frustration is a well-recognized tactic in everything from negotiation to daily life. See Lickerman, *supra* note 170; Kimberlyn Leary et al., *Negotiating with Emotion*, HARV. BUS. REV. (2013) <https://hbr.org/2013/01/negotiating-with-emotion> [<https://perma.cc/KPC8-BUFR>] (“One obvious answer is take a break. Stepping out for even a few minutes can clear your head. It can work like a reset button in the discussion, disrupting whatever dysfunctional pattern has emerged.”); *How to Calm Yourself Down When You’re Upset*, WIKIHOW (2015), <http://www.wikihow.com/Calm-Down-when-You%27re-Upset> [<https://perma.cc/3M4P-PN23>] (“Remove yourself from an upsetting situation.”).

¹⁷⁵ PROCESSING AWARDS, *supra* note 8, § B(4)(d)(13).

¹⁷⁶ Letter from Veterans Service Center Manager, Department of Veterans Affairs, to JR (Nov. 15, 2013) (on file with the author).

VA purposes.” This is because, even though the VA’s decision of financial incompetency violated the VA’s own standards of proof in the first place, the VA did not negate the initial finding of financial incompetency. It only declared that JR was “restored to competency” after a period of financial incompetency.

Fourth, JR was deprived of his constitutional right under the Second Amendment to own or purchase a firearm for one year without judicial review of the deprivation.

Fifth, during the “adjudication” of JR’s financial incompetency, the VA never considered whether he was a danger to himself or others. In fact, the finding of financial incompetency was not based upon his PTSD—which has been referred to by proponents of the VA’s incompetence determination policy as a mental illness¹⁷⁷—but rather on the brain injury symptoms, which the VA considered to be so minor they warranted only a 10 percent rating of disability. JR is not the only veteran to have been adjudicated based on reasons unrelated to mental illness. During debate on the House Floor regarding the VA’s policy of reporting incompetent veterans to the NICS list, Jennifer—the wife of a veteran named Corey, who experienced difficulties similar to those of JR—wrote a letter explaining the situation:

[Corey] was severely injured by an IED explosion in 2004, which caused severe burns, damage to his lungs, and severe traumatic brain injury after shrapnel entered his skull. Corey spent . . . 5 years recovering from his injuries. Jennifer reports that he is walking, talking, and enjoying life at home with his two children.

Now it gets really sad. Because of his head injury, Corey still requires help with certain things. The VA said he needed help managing his disability compensation payments, and they named Jennifer, his spouse, as his fiduciary

On May 19, 2009, we had our annual fiduciary meeting with the VA field examiner. At the end of the meeting, our field examiner said he needed to read a statement to us. He read the Brady Bill statement and then stated that Corey can’t own, possess, use, be around, et cetera, any firearms. He then went on to say that anyone in our household can’t own a gun while living in this household.

I asked him about Corey going on adaptive hunting trips and he said he couldn’t. Corey stated that he had a gun that was handed down from his grandfather and that Corey was going to hand it down to his son, and the field examiner told him that he couldn’t have it. He stated to Corey that if he did own a gun or be around a gun that he would be threatened with imprisonment.

The way that that field examiner talked to Corey about this issue was not appropriate. The field examiner said that I could challenge it and

¹⁷⁷ See, e.g., Letter from Admiral Thad Allen, USCG et al., Veterans Coalition for Common Sense, to Congress (Mar. 14, 2017) (regarding the passage of H.R. 1181).

handed me a blank sheet of paper with a VA heading. I asked the field examiner for the statement that he read to me, but he said that he had to ask his boss if he could actually provide a copy of that statement. After 2 weeks of me emailing him, I finally got the attached papers in the mail.¹⁷⁸

Finally, one can imagine that the process to restore JR's constitutional rights would have taken much longer if JR had not had an attorney working on the issue. The VA made very clear in its proposal letter that if JR wanted help clearing up the financial incompetency issue, he was prohibited from hiring an attorney to help him with his rebuttal but could rely on either a VSO or pro bono attorney. JR happened to have the help of a pro bono legal clinic at a law school when the VA issued its proposal.¹⁷⁹ In contrast, most veterans whom the VA proposes to be financially incompetent fight the battle on their own, suffer being declared financially incompetent, and then appeal before they are permitted to hire an attorney. Indeed, even with a law clinic helping JR gather evidence, the VA failed to consider the statements JR and his wife made concerning his financial competency when deciding whether he was financially incompetent.¹⁸⁰

Concerns with the VA's current system have arisen recently in two different legislative settings: (1) a proposal that Social Security adopt a substantially similar method for reporting financially incompetent payees to the NICS list; and (2) a proposal to prevent the VA from continuing their current practice of reporting financially incompetent veterans. Using the example of the VA's declaration of financial incompetency as a background for examining these congressional actions is instructive.

IV. FEDERAL LEGISLATION REGARDING FINANCIAL INCOMPETENCY DETERMINATIONS

A. The 21st Century Cures Act

In December 2016, Congress passed the 21st Century Cures Act (Cures Act).¹⁸¹ The Cures Act concerned several different medical issues ranging from pharmaceutical approval to health care delivery.¹⁸² Buried within the text of the Cures Act was the VA's regulation regarding the rights of a veteran subject to a

¹⁷⁸ 163 CONG. REC. H2109 (daily ed. Mar. 16, 2017) (statement of Rep. Roe).

¹⁷⁹ There are currently almost fifty veterans' clinics located at law schools across the nation. There are also many pro bono legal organizations that help veterans. However, all of these organizations have limited capabilities due to funding restrictions or lack of resources.

¹⁸⁰ Letter from Veterans Service Center Manager, Department of Veterans Affairs, to JR (Oct. 1, 2012) (on file with the author) ("You did not submit any evidence showing you were competent to handle your financial affairs.").

¹⁸¹ P.L. 114-255, 130 Stat. 1307 (codified at 38 U.S.C. § 5501A (2016)).

¹⁸² *Id.*

determination of financial incompetency by the VA.¹⁸³ While the codification is not a word-for-word copy of the existing VA regulation, the statute provides the same standards for notice and opportunity to be heard, including the presentation of evidence regarding financial incompetency.¹⁸⁴ The language of the Cures Act also does not specifically mention firearm rights or determinations of the dangerousness of the veteran.¹⁸⁵ Instead, it merely codifies existing procedure at the VA for determinations of financial incompetency.¹⁸⁶

There is one interesting addition in the statute that is absent from the preexisting regulation. That is the addition of the words “including by counsel” when discussing the veteran’s right to be represented at a hearing during the proposal for financial incompetency.¹⁸⁷ As this hearing is in the proposal phase (i.e., notice phase) of the financial incompetency determination, the statutory ban on veterans hiring paid attorneys in the VA process applies.¹⁸⁸ There was no discussion on the floor of the House or Senate regarding the inclusion of this language or an acknowledgment that veterans are not permitted to *hire* a lawyer at this stage in proceedings.¹⁸⁹

B. Social Security Administration Prohibited from Reporting Incompetent Payees in a Manner Similar to the VA

During the FBI’s initial rollout of NICS, the SSA reviewed its procedures and concluded that a determination that a Social Security beneficiary needed a representative to handle his or her money did not justify a mental incompetency determination for the purposes of gun control.¹⁹⁰ However, in 2013, DOJ informed the SSA that Social Security beneficiaries with representative payees must be reported to the NICS list due to the beneficiaries’ inability to manage their own affairs.¹⁹¹ In 2016, the SSA solicited comments before promulgating a final rule in

¹⁸³ *Id.*

¹⁸⁴ 38 U.S.C. § 5501A (2016).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Compare* 21st Century Cures Act of 2015, Pub L. No. 114-255, 130 Stat. 1033, 1307, § 14017 (2016) (“The Department of Veterans Affairs, prior to determining a beneficiary is mentally incompetent, must provide the beneficiary with notice of the proposed determination and opportunities to request a hearing, be represented at the hearing, and present evidence.”) *with* 38 U.S.C. § 5501A (2016) (“The Secretary may not make an adverse determination concerning the mental capacity of a beneficiary to manage monetary benefits paid to or for the beneficiary by the Secretary under this title unless such beneficiary has been provided . . . [a]n opportunity to be represented *at no expense to the Government* . . .” (emphasis added)).

¹⁸⁹ *See generally* H.R. 1181, 115th Cong. (2017) (enacted).

¹⁹⁰ CONG. RESEARCH SERV., *supra* note 106, at 18 (noting that beneficiaries of all types of Social Security benefits, to include Social Security Disability Insurance (SSDI), may be appointed a fiduciary).

¹⁹¹ WILLIAM J. KROUSE, SCOTT D. SZYMENDERA, & WILLIAM R. MORTON, CONG.

December 2016 that would require the SSA to report payees deemed incompetent for purposes of managing SSA funds to the NICS list.¹⁹² The SSA's proposed rule required both a determination that the payee deemed incompetent could not handle his own SSA payment, and a determination that the beneficiary suffered from a primary diagnosis of a mental impairment and was between the ages of eighteen and sixty-six.¹⁹³ Like the VA's procedures, no determination was to be made as to the beneficiary's threat of harm to himself or others.¹⁹⁴ The SSA's Inspector General estimated that 81,000 beneficiaries would have been affected by this rule and reported to the NICS list as prohibited persons.¹⁹⁵ This number is far shy of the VA's reporting of more than 160,000 veterans to the NICS system.¹⁹⁶ In December 2016, the SSA promulgated the final rule.¹⁹⁷

In early 2017, Congress began to debate the wisdom of this rule. The arguments for and against the SSA rule on the House Floor were instructive. Proponents of a joint resolution vacating the rule opposed painting those with a mental health disorder requiring a representative payee as somehow violent.¹⁹⁸ Numerous organizations submitted letters supporting the Joint Resolution.¹⁹⁹ For instance, the National Council on Disability, the independent agency which advises Congress and the President on disability policy, commented:

[T]here is, simply put, no nexus between the inability to manage money and the ability to safely and responsibly own, possess or use a firearm. This arbitrary linkage not only unnecessarily and unreasonably deprives individuals with disabilities of a constitutional right, it increases the stigma for those who, due to their disabilities, may need a representative payee[.]²⁰⁰

Similarly, the American Civil Liberties Union (ACLU) opposed the SSA rule because "[t]here is no data to support a connection between the need for a representative payee to manage one's Social Security disability benefits and a

RESEARCH SERV., R44752, GUN CONTROL, MENTAL INCOMPETENCY, AND SOCIAL SECURITY ADMINISTRATION FINAL RULE 11 (2017).

¹⁹² *Id.* at 11–12.

¹⁹³ *Id.* at 12; Implementation of the NICS Improvement Amendments Act of 2007, 18 Fed. Reg. 91713 (Dec. 19, 2016) (to be codified at 20 C.F.R. pt. 421).

¹⁹⁴ KROUSE ET AL., *supra* note 191, at 11.

¹⁹⁵ CONG. RESEARCH SERV., *supra* note 106, at 12.

¹⁹⁶ *Id.* at ii.

¹⁹⁷ *Id.*

¹⁹⁸ 163 CONG. REC. H895 (daily ed. Feb. 2, 2017) (statement of Rep. Goodlatte).

¹⁹⁹ *See, e.g.*, 163 CONG. REC. S1167–69 (daily ed. Feb. 15, 2017) (noting that 23 groups, mostly concerning disability rights, expressed approval of the Joint Resolution).

²⁰⁰ 163 CONG. REC. H896 (daily ed. Feb. 2, 2017) (letter from National Council on Disability, (Jan. 24, 2017)) (second alteration in original).

propensity toward gun violence.”²⁰¹ The ACLU also worried that a determination by the “SSA line staff” that a beneficiary was unable to manage an SSA payment was not an “‘adjudication’ in any ordinary meaning of the word. Nor is it a determination that the person ‘[l]acks the mental capacity to contract or manage his own affairs.’”²⁰²

The lack of due process granted to payees desiring to appeal the restriction on their gun rights was also a concern. Representative Bob Goodlatte noted:

[T]he appeals process is severely flawed because it puts the burden on individuals to prove that restoring their Second Amendment rights would not pose a danger to public safety or be contrary to the public interest. In every other instance in which someone is facing a loss of his ability to possess a firearm, the burden is on the government to prove that the individual should have his right taken away.²⁰³

Those who supported the SSA rule noted that this rule would only affect those who had a mental health condition so disabling that the beneficiary could not work. Representative Mike Thompson noted that “[t]hese are not people just having a bad day. These are not people simply suffering from depression or anxiety or agoraphobics. These are people with a severe mental illness who can’t hold any kind of job or make any decisions about their affairs.”²⁰⁴ The debate on the Senate Floor was substantially similar to that of the House.²⁰⁵ In February 2017, Congress passed and President Trump signed a joint resolution prohibiting SSA from implementing the rule and reporting incompetent beneficiaries to the NICS list.²⁰⁶

C. The Veterans 2nd Amendment Protection Act

In 2008, Congress—lead by Senator Richard Burr of North Carolina—began introducing and failing to pass legislation meant solely to prevent the VA from reporting financially incompetent veterans as those “adjudicated as a mental defective” to the NICS list.²⁰⁷

On March 16, 2017, the House passed H.R. 1181, referred to as “The Veterans 2nd Amendment Protection Act.”²⁰⁸ H.R. 1181 prohibited the VA from reporting

²⁰¹ 163 CONG. REC. H898 (daily ed. Feb. 2, 2017) (letter from American Civil Liberties Union, (Feb. 1, 2017)).

²⁰² *Id.* (alteration in original).

²⁰³ 163 CONG. REC. H895 (daily ed. Feb. 2, 2017) (statement of Rep. Goodlatte).

²⁰⁴ *Id.*

²⁰⁵ 163 CONG. REC. H904–06 (daily ed. Feb. 2, 2017).

²⁰⁶ Implementation of the NICS Improvement Amendments Act of 2007, 18 Fed. Reg. 91714 (Dec. 19, 2016) (to be codified at 20 C.F.R. pt. 421); H.R.J. Res. 40, 115th Cong. (2017).

²⁰⁷ CONG. RESEARCH. SERV., *supra* note 106, at 14; *see also* S.669, 111th Cong. (2009).

²⁰⁸ H.R. 1181, 115th Cong. (2017) (enacted).

veterans deemed financially incompetent for VA purposes to the FBI NICS list as prohibited persons.²⁰⁹ In particular, the proposed additions to Section 55 of Title 38 read:

§ 5501B. Conditions for treatment of certain persons as adjudicated mentally incompetent for certain purposes

Notwithstanding any determination made by the Secretary under section 5501A of this title, in any case arising out of the administration by the Secretary of laws and benefits under this title, a person who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness shall not be considered adjudicated as a mental defective under subsection (d)(4) or (g)(4) of section 922 of title 18 without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself or others.²¹⁰

The debate surrounding this legislation is instructive as it encompasses the vast majority of concerns often raised in the public—from those in favor of abolishing the VA's current practices to those who wish them to remain in place. They are also quite similar to the concerns on both sides raised during the debate vacating Social Security's almost identical final rule. Notably missing from this debate are the voices of organizations, including the ACLU, who came out strongly against the SSA's attempt to report American citizens to the NICS list based upon a staff employee's determination of financial incompetence.

Opponents of H.R. 1181 argued that more time was needed to determine the effects of the bill on those already included on the NICS list through this process. Representative Elizabeth Esty argued that one of the main concerns of altering this process is that while she agrees these determinations are overinclusive,²¹¹ there are veterans who are legitimately mentally ill being captured by financial incompetency adjudications:

To be clear, of the 170,000 veterans currently prohibited from owning a firearm, as of 2015, almost 20,000 of them were diagnosed with schizophrenia, over 11,000 with dementia, and over 5,000 with Alzheimer's. For a veteran suffering with a significant mental health condition like one of these, access to a firearm is a serious matter.²¹²

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ 163 CONG. REC. H2104 (daily ed. Mar. 16, 2017) (statement of Rep. Esty).

²¹² *Id.*

Representative Esty went on to argue that some of these mentally ill people may be a harm to themselves or others, and inclusion on the NICS list is necessary to prevent suicides.²¹³

Concern about the potential for veterans considered financially incompetent by the VA to commit suicide is the overarching theme of the opponents of H.R. 1181. This concern was mentioned by the bill's opponents over twenty times on the House Floor during its debate.²¹⁴ Suicide is also the primary concern of every letter submitted in the Congressional Record of the debate by those opposed to altering the VA's reporting procedures.²¹⁵

It is also clear from comments made on the House Floor that some opponents of H.R. 1181 erroneously believe that the VA determinations of financial incompetency are being made by physicians familiar with the veteran's situation and are primarily targeting those veterans with serious mental illness. For instance, Representative Ami Bera notes, "I don't want to take doctors out of this process We need to continue to allow doctors to report the risks when they see them. It makes their patients safer, their communities safer, and it is the right thing to do."²¹⁶ In the same vein, Representative Thompson remarked that "[t]he VA has done a good job to keep more than 174,000 veterans with serious mental health problems from getting a gun This bill would make it easier for veterans to take their own life."²¹⁷

Proponents of the bill prohibiting the VA from sharing the names of those appointed a fiduciary to the NICS list argue that concerns about the propensity for harming oneself are not allayed by a financial incompetency determination.

Opponents of this bill argue that dangerous or suicidal veterans could have easy access to guns if this VA process is stopped. However, the program does not make any determination on veterans' mental health or the dangers they pose to others. The VA system focuses only on whether veterans receive assistance with their finances.²¹⁸

²¹³ *Id.* (discussing the "wholesale elimination of the VA's long-established practice to help keep firearms out of the hands of veterans who are at serious risk of harming themselves or others is dangerous and misguided").

²¹⁴ 163 CONG. REC. H2102–13 (2017).

²¹⁵ *Id.*

²¹⁶ 163 CONG. REC. H2106–07 (2017) (statement of Rep. Bera).

²¹⁷ 163 CONG. REC. H2107 (2017) (statement of Rep. Thompson).

²¹⁸ 163 CONG. REC. H2106 (2017) (statement of Rep. Lamborn).

Concerns that the VA employee making the financial incompetency determination is not proficient enough to make these determinations were raised by Representative Mike Bost who noted that currently “they can’t even have a judge or a doctor make that decision This legislation still allows for dangerous individuals to be denied their firearms, but it leaves the determination to someone with the expertise to understand their case.”²¹⁹

Proponents also expressed concern that the process for stripping veterans of their gun rights is less stringent than the consideration given to other groups of prohibited persons. For instance, Representative Phil Roe argued:

It is outrageous that the only group of people that can have their constitutional rights taken away without a hearing before a judge or magistrate are the very people who fought for those rights and [for] their dependents. Even criminals must be convicted in a court of law before their names are added to that list.²²⁰

The argument was also raised that the VA’s current process of reporting those in need of fiduciaries to the NICS list is overinclusive and requires a higher burden to be removed from the list than there is to be included.²²¹

Opponents of H.R. 1181 argued that the bill would require the DOJ to remove immediately those names on the NICS list provided by the VA who do not have a court adjudication of mental defectiveness.

The fact of the matter is that, should H.R. 1181 be signed into law, it would need to be read together with the NICS Improvement Amendments Act of 2007, which requires—requires—Federal agencies to update the records they have previously shared with NICS, meaning, should this bill pass, the VA would be required to remove the 170,000 records they have previously shared with NICS since none of those were approved by a court, nor did they meet the new standard established by this bill.²²²

However, the proponents of the bill have stated on the Floor that the bill will have no effect on those veterans already included on the NICS list through this process. As Representative Phil Roe noted:

The text of this bill does not remove the names of anyone who is currently on the NICS list. It simply prohibits the VA Secretary from continuing to send the names of beneficiaries who utilize a fiduciary to the

²¹⁹ 163 CONG. REC. H2106 (2017) (statement of Rep. Bost).

²²⁰ 163 CONG. REC. H2103 (2017) (statement of Rep. Roe).

²²¹ *Id.* at H2112.

²²² 163 CONG. REC. H2104 (2017) (statement of Rep. Esty).

NICS list. And there is nothing in the bill that would require the VA Secretary to take any action with respect to those already on the list.²²³

H.R. 1181 passed the House of Representatives on March 16, 2017, by a roll call vote (240–175).²²⁴ To date, the Senate of the 115th Congress has not considered a sister bill.

V. THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS AND THE APPLICATION OF § 922(G) TO THE VA'S DETERMINATION OF FINANCIAL INCOMPETENCY

The VA's actions depriving veterans of their Second Amendment rights has the potential to impact a number of constitutional considerations. This Article considers whether the finding of "financial incompetence for VA purposes" passes constitutional scrutiny as an adjudication that the veteran has been "adjudicated as a mental defective" under § 922(g).

The Second Amendment to the United States Constitution²²⁵ has been a part of America's historical fabric since 1791. However, it was not until 2008 that the United States Supreme Court, in *District of Columbia v. Heller*, clarified that the Constitutional right was an individual right.²²⁶ Prior to *Heller*, whether the right to possess firearms applied to citizens in the collective for militia purposes, or applied to each citizen as an individual right, was an issue undecided by the Supreme Court and thus open to interpretation in all other state and federal courts.²²⁷ *Heller*, in a majority opinion written by Justice Antonin Scalia, held that the Second Amendment conferred an individual right to possess firearms, regardless of participation in a militia.²²⁸ Although the Court declared the Second Amendment to be an individual right, that did not mean that the right was unlimited. The Court indicated that some "long-standing prohibitions" such as restriction on the rights of criminals or the mentally ill to possess firearms would not be negated by the *Heller* decision.²²⁹

Although *Heller* and the Court's subsequent case, *McDonald v. City of Chicago*,²³⁰ clarified that the Second Amendment created an individual right and was applicable to the states through the Fourteenth Amendment's incorporation doctrine, they did not decide the level of scrutiny courts should give to restriction of

²²³ 157 CONG. REC. H2107 (2017) (statement of Rep. Roe).

²²⁴ CONG. RESEARCH. SERV., *supra* note 106, at 12.

²²⁵ The Second Amendment, adopted on December 15, 1791, reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. CONST. amend. II.

²²⁶ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

²²⁷ *Id.* at 625–26.

²²⁸ *Id.* at 595.

²²⁹ *Id.* at 626.

²³⁰ 561 U.S. 742 (2010).

this right.²³¹ While the Court declined to define a specific level of scrutiny applicable to infringements on the right to bear arms, the Court did dismiss the use of a “rational basis” level of scrutiny when considering “the extent to which a legislature may regulate a specific, enumerated right.”²³² After these two Supreme Court decisions, lower level courts have been grappling with the level of scrutiny to apply to restrictions imposed on gun owners in various situations ranging from prohibitions on open-carry laws²³³ to restrictions on ownership of specific types of firearms.²³⁴

A. The Two-Step Process

In light of *Heller*’s ambiguity concerning the level of scrutiny courts should apply when evaluating restrictions on the right to possess firearms, appellate courts have stepped into the breach and created a framework for analyzing these situations.

In 2010, the Third Circuit decided the case *U.S. v. Marzzarella*, applying a two-step process for determining the constitutionality of restrictions in light of *Heller*.²³⁵ In *Marzzarella*, the appellant was indicted and convicted for possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k).²³⁶ He appealed and argued that § 922(k), as applied to his particular situation, violated his Second Amendment right to keep and bear arms under *Heller*.²³⁷ When considering *Marzzarella*’s appeal, the Third Circuit interpreted *Heller* to provide a two-pronged approach to determine the constitutionality of a firearms restriction:

As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.²³⁸

The first prong, determining “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee,” requires an historical analysis of the action being regulated to determine if it is historically

²³¹ See *id.* at 755 (discussing application of the 14th Amendment but not referring to scrutiny).

²³² *Heller*, 554 U.S. at 628 n. 27.

²³³ See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013).

²³⁴ See, e.g., *Houston v. City of New Orleans*, 675 F.3d 441, 445 (5th Cir. 2012) (stating that “[claimant] does not have a Second Amendment right to the *particular* firearm seized”).

²³⁵ *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

²³⁶ *Id.* at 88.

²³⁷ *Id.*

²³⁸ *Id.* at 89 (citation omitted). “Means-end scrutiny” could mean either intermediate or strict scrutiny. See *id.* at 95–96.

an action that was protected by the Second Amendment.²³⁹ The second prong requires the court to weigh the government action against the constitutional right the action curtails.²⁴⁰ This is often referred to as applying a level of scrutiny. While the level of scrutiny applied to these challenges varies from court to court, for the most part the other federal circuits have adopted the Third Circuit's two-prong approach to analyzing challenges to firearm restrictions.²⁴¹

1. First Prong: "Imposes a burden on conduct falling within the scope of the Second Amendment's Guarantee"

Considering whether the conduct being regulated falls outside the scope of the Second Amendment has been recently separated into two steps.²⁴² The first is to review whether ownership of weapons under the circumstance in question was contemplated by the Second Amendment.²⁴³ The second step looks at whether the individual can differentiate his circumstances from the circumstances being regulated.²⁴⁴

The historical inquiry of the first prong, a review of whether ownership of weapons under this circumstance was contemplated by the Second Amendment, is often murky and leads to inconclusive results. One scholar has noted that more often the inquiry of constitutionality "winds up turning more on the second step than the

²³⁹ *Id.* at 89–90.

²⁴⁰ *Id.* at 95.

²⁴¹ *See, e.g.,* *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 344 (3d Cir. 2016); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015); *Heller v. District of Columbia*, 801 F.3d 264, 272 (D.C. Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 197 (5th Cir. 2012); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010).

²⁴² *Binderup*, 836 F.3d at 346–47.

²⁴³ *Id.*

²⁴⁴ *Id.* (reconciling *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) and *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011)) ("Read together, *Marzzarella* and *Barton* lay out a framework for deciding as-applied challenges to gun regulations. At step one of the *Marzzarella* decision tree, a challenger must prove, per *Barton*, that a presumptively lawful regulation burdens his Second Amendment rights. This requires a challenger to clear two hurdles: he must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member . . . and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class . . .").

first. Historical analysis does not provide clear answers to most of the difficult Second Amendment issues that courts face today, and history therefore continues to take an inevitable backseat to practical policy considerations.”²⁴⁵

For example, the *Marzzarella* court could not make the determination as to whether possessing unmarked firearms in the home was protected under the Second Amendment, so instead moved on to the second prong of the inquiry finding that even if owning such firearms was within the scope of the Second Amendment, the government action passed muster under intermediate scrutiny.²⁴⁶

Determining the historical application of the Second Amendment to the mentally ill has been equally muddled. When attempting to argue that the specific conduct regulated falls outside the protection of the Second Amendment, it is in the government’s best interests to establish that the regulation of possession by the mentally ill was something considered at the time the Second Amendment was ratified.²⁴⁷ If the mentally ill were not permitted to own firearms at that time, then the common law right to possession for these people did not exist and there are no Second Amendment rights to enforce.²⁴⁸ In that case, “the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.”²⁴⁹ Notably, some courts have considered laws restricting firearm possession similar to the “presumptively lawful regulatory measures” mentioned in *Heller*, such as restrictions on the rights of criminals or the mentally ill, to automatically survive Second Amendment scrutiny.²⁵⁰ However, other circuits have noted that “[t]his approach . . . approximates rational-basis review, which has been rejected by *Heller*” and require the two-prong test to be completed.²⁵¹

²⁴⁵ Allen Rostron, *The Continuing Battle over the Second Amendment*, 78 ALB. L. REV. 819, 825 (2014).

²⁴⁶ *Marzzarella*, 614 F.3d at 101.

²⁴⁷ *Ezell v. City of Chi.*, 651 F.3d 684, 702–03 (7th Cir. 2011) (“[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.”).

²⁴⁸ For instance, the Third Circuit in *Barton* found that “the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses” because this category of persons have been historically restricted in their right to possess firearms. *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 346 (3d Cir. 2016) (citing *Barton*, 633 F.3d at 175, *overruled in part by Binderup*, 836 F.3d at 349).

²⁴⁹ *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (quoting *Ezell*, 651 F.3d at 702–03).

²⁵⁰ *See, e.g., United States v. White*, 593 F.3d 1199, 1205 (“[W]e limit our holding to deciding whether § 922(g)(9) may be properly included as a presumptively lawful ‘longstanding prohibition[] on the possession of firearms,’ a category of prohibitions the Supreme Court has implied survives Second Amendment scrutiny.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008))).

²⁵¹ *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (citing *Heller*, 554 U.S. at 628 n.27). *See also Greeno*, 679 F.3d at 517–18; *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*,

Courts undertaking the task of excavating the historical record for indications that possession of firearms by the mentally ill was in place at the time of ratification of the Second Amendment are few and far between in the aftermath of *Heller*. Most of the cases that have discussed the mentally ill have done so in regards to the second prohibition of § 922(g)(4) applying to those “committed to a mental institution” as opposed to those “adjudicated as a mental defective.”²⁵² Three cases have specifically looked at § 922(g)(4) after *Heller* and *Marzzarella*, two of which are applicable here.²⁵³

In *Tyler v. Hillsdale County Sheriff's Department*, a panel of the Sixth Circuit reviewed § 922(g)(4)'s prohibition on those who have been “committed to a mental institution.”²⁵⁴ In *Keyes v. Lynch*, another case involving commitment, the U.S. District Court for the Middle District of Pennsylvania undertook an extensive analysis of prohibitions on possession by the mentally ill using *Tyler* and the other post-*Marzzarella* cases as its guide.²⁵⁵ In the historical exploration required for step one of the first prong, both the *Tyler* and *Keyes* courts discussed that laws restricting the possession of firearms by the mentally ill are not found in America until the twentieth century around 1930 and then again in 1968.²⁵⁶ However, the *Keyes* court acknowledged, along with other courts, that all the prohibitions in § 922(g) were generally crafted to “keep firearms out of the hands of presumptively ‘risky people.’”²⁵⁷ In *Keyes*, the government argued that “there is historical documentation of disarmament of persons ‘perceived to be dangerous,’ which . . . includes as a

775 F.3d 308, 324 (6th Cir. 2014), *rehearing en banc granted, vacated*, (Apr. 21, 2015). While *Tyler*'s opinion has been vacated, the analysis in *Tyler* is helpful to explore because the case has been cited by at least twenty other subsequent court decisions and because there is a dearth of case law on the constitutionality of § 922(g)(4) post-*Heller*.

²⁵² See 18 U.S.C. § 922(g) (2005).

²⁵³ The third case, *United States v. Rehlander*, is not applicable here because “[t]he case avoided the constitutional question raised by *Heller* by narrowly construing the phrase ‘having been committed to a mental institution’ to not include a short-term psychiatric hospitalization pursuant to an ex parte procedure.” *Keyes v. Lynch*, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016) (citing *United States v. Rehlander*, 666 F.3d 45, 47–49 (1st Cir. 2012)).

²⁵⁴ *Tyler*, 775 F.3d at 311.

²⁵⁵ *Keyes*, 195 F. Supp. 3d at 715–22.

²⁵⁶ *Tyler*, 775 F.3d at 320–22; *Keyes*, 195 F. Supp. 3d at 718. These cases also discuss the fact that legislation prohibiting the ownership of weapons by those of “unsound mind” and the mentally ill may not have been necessary because courts had the power to more readily confine these individuals. See *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1377–78 (2009).

²⁵⁷ *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (quoting *United States v. Bass*, 404 U.S. 336, 345 (1971)); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983), *superseded by statute*, Firearms Owners' Protection Act, 99 Pub. L. No. 308, 100 Stat. 449 (1986), *as recognized in* *Logan v. United States*, 552 U.S. 23, 27–28 (2007); *Yancey*, 621 F.3d at 683.

subset the mentally ill.”²⁵⁸ The government pointed to the notes from state ratifying conventions cited in the *Heller* case which indicate that “the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.”²⁵⁹ Despite this discussion, the *Keyes* court noted that “there does not appear to be a specific mention of mentally ill individuals and the extent to which this concern over propensity for violence applied to them.”²⁶⁰

However, despite the failure of legislation to historically restrict the mentally ill from possessing firearms, the *Keyes* court held that

while there is little historical evidence of mentally ill people being subject to laws specifically disarming them, there is a clear history in this country of the institutionalization of persons with severe mental illness or mental illness that made the afflicted persons dangerous. Obviously, institutionalized persons have not as a general rule been permitted to possess firearms. Also, we find there is clear historical evidence that persons prone to violent behavior were outside the scope of Second Amendment protection. Further, to the extent that there is documented evidence regarding the justifications underlying § 922(g)(4), it appears that this statute subsection was likely animated by the same concerns that justified the felon gun dispossession statute subsection in § 922(g)(1), as elaborated upon in *Barton*. That is, the concern that certain individuals, whether those with felonies or those with mental illness, were too irresponsible or too dangerous to be trusted with firearms.²⁶¹

In contrast to the *Keyes* court’s view that the whole of § 922(g)(4) addressed mental illness, the *Tyler* court assumed it was a given that the portion prohibiting those “adjudicated as a mental defective” addressed those suffering from a mental illness, which it determined was certainly historically prohibited from owning firearms.²⁶² Interestingly, the *Tyler* court required more evidence that someone “committed to a mental institution” was in fact mentally ill:

We are not aware of any other historical source that suggests that the right to possess a gun was denied to persons who had ever been committed to a mental institution, regardless of time, circumstance, or present condition.

We need not reinvent the wheel and justify with historical reasoning § 922(g)(4)’s prohibition on possession of firearms by the mentally ill. So much we may take for granted. *Heller* has already sanctioned the “longstanding prohibitio[n] on the possession of firearms by . . . the

²⁵⁸ *Keyes*, 195 F. Supp. 3d at 719.

²⁵⁹ *Id.* (citing *Barton*, 633 F.3d at 173 (citing *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008))).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308, 321–22 (6th Cir. 2014).

mentally ill” as permissible. The Court did not directly support this statement with citations. Justice Breyer suggested that the Court’s statement amounted to “judicial *ipse dixit*.” The Court, in turn, responded that “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”

The problem, as noted, is that the class of individuals constituting those ever previously mentally institutionalized is not identical to the class of individuals presently mentally ill. Ultimately, the government cannot establish that § 922(g)(4) regulates conduct falling outside the scope of the Second Amendment as it was understood in 1791. We cannot conclude, then, that the regulated activity is “categorically unprotected.”²⁶³

Because the *Tyler* court found that restrictions on persons committed to mental institutions were not something that historically fell outside the protection of the Second Amendment, it did not move on to the second step of the first prong.²⁶⁴ The *Keyes* court, however, finding that historically those who were institutionalized had no access to weapons, did address the second step.²⁶⁵

If the conduct considered falls outside the protection of the Second Amendment, the second step of the first prong requires the appellant to “present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class.”²⁶⁶ The Third Circuit, in *Binderup*, a case involving § 922(g)(1)’s felon prohibition, explained the burden on the prohibited person to distinguish himself from those historically barred from the Second Amendment’s protections in this example:

These facts must speak to the traditional justifications that legitimize the class’s disability. In *Barton* we noted at least two ways of doing this: (1) “a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen,” or (2) “a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.”²⁶⁷

²⁶³ *Id.* (citing *Heller*, 554 U.S. at 626, 722, 635; *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)).

²⁶⁴ *Id.* at 322.

²⁶⁵ *Keyes v. Lynch*, 195 F. Supp. 3d 702, 719–21 (M.D. Pa. 2016).

²⁶⁶ *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 365–66 (3d Cir. 2016) (citing *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)).

²⁶⁷ *Id.*

While the *Binderup* court was considering a different prohibition of § 922(g), the implications are readily transferable to an evaluation of § 922(g)(4). The *Keyes* court applied this standard in its case concerning the rights of a person previously committed by allowing the appellant to demonstrate that:

he is “no more dangerous than a typical law-abiding citizen,” or that he “poses no continuing threat to society.” And if he has made such a showing, then his ability to possess a firearm “for protection of hearth and home is not just conduct protected by the Second Amendment, it is the core of the Second Amendment’s guarantee.”²⁶⁸

Ultimately, the *Keyes* court found that the appellant had distinguished his own circumstances from those mentally ill persons who are prohibited from owning weapons.²⁶⁹ For instance, the appellant had only one commitment—at age fifteen—because he was a danger to himself.²⁷⁰ Since that time and in his adulthood, he had no further findings of dangerousness or commitment, had served in the military, had been employed as a state corrections officer and issued a firearm, and had his commitment expunged from his record after a court found that he no longer suffered from a mental condition and did not pose a danger to himself or others.²⁷¹ Based upon this evidence, the court found that the appellant “has shown that he is ‘no more dangerous than a typical law-abiding citizen’ at this point in his life, [and] that he ‘poses no continuing threat to society.’”²⁷² Thus, Second Amendment protections applied to him.²⁷³

2. *The Second Prong: Scrutiny of the Governmental Restriction*

In some cases, the first prong of the two-step test resolves the issue and the court finds that the regulated conduct falls outside the protection of the Second Amendment. Thus, any regulation of the activity is permitted.²⁷⁴ However, if the individual can demonstrate that the conduct being prohibited by the government was originally protected under the Second Amendment or that the individual’s circumstances are so different from the historically prohibited category that the Second Amendment protections should apply to him, the court moves to the second prong of the *Marzzarella* test.²⁷⁵

²⁶⁸ *Keyes*, 195 F. Supp. 3d at 720.

²⁶⁹ *Id.* at 722.

²⁷⁰ *Id.* at 706.

²⁷¹ *Id.* at 720–21.

²⁷² *Id.* at 722.

²⁷³ *Id.*

²⁷⁴ See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (holding that the regulation would pass constitutional muster, no matter how burdensome, because the activity did not fall within the scope of original intent of the Second Amendment).

²⁷⁵ It is noted here that the court in *Keyes* court held the restriction as applied to

The second prong of the test requires the court to apply a level of scrutiny to the government action in order to determine if the restriction on the right to possess weapons is constitutional.²⁷⁶ The Court in *Heller* mandated that rational basis scrutiny was inappropriate, which leaves the courts to apply either intermediate or strict scrutiny.²⁷⁷ Intermediate scrutiny requires that a challenged law circumscribing constitutional rights “must be substantially related to an important governmental objective.”²⁷⁸ Strict scrutiny, on the other hand, analyzes restrictions on constitutional rights by requiring that the government show the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”²⁷⁹

Determining which standard to apply has led to a split in the circuit courts although all the courts have agreed that some heightened scrutiny must apply.²⁸⁰ However, the majority of courts has stopped short of applying a strict standard and have instead applied an intermediate scrutiny standard to government action regulating Second Amendment rights.²⁸¹ It appears that many of these circuits use the *Marzzarella* case as the yardstick for which scrutiny to apply. In *Marzzarella*, the Third Circuit cautioned against the use of strict scrutiny in all cases concerning

appellant to be unconstitutional based upon his distinguishing himself from the category of those historically prohibited from possessing firearms. The court should have moved on to the second prong of the *Marzzarella* test and used some form of scrutiny to determine if the restrictions on the defendant were valid. *See Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 353 (3d Cir. 2016) (“In sum, the Challengers have carried their burden of showing that their misdemeanors were not serious offenses despite their maximum possible punishment. This leads us to conclude that *Binderup* and *Suarez* have distinguished their circumstances from those of persons historically excluded from the right to arms. That, in turn, requires the Government to meet some form of heightened scrutiny at the second step of the *Marzzarella* framework.”).

²⁷⁶ *Marzzarella*, 614 F.3d at 95.

²⁷⁷ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

²⁷⁸ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

²⁷⁹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (citation omitted).

²⁸⁰ *Binderup*, 836 F.3d at 344; *see also Marzzarella*, 614 F.3d at 97–101 (applying intermediate scrutiny and, in the alternative, strict scrutiny to § 922(k)’s prohibition on possession of any firearm with a destroyed serial number); *United States v. Williams*, 616 F.3d 685, 692–93 (7th Cir. 2010) (applying intermediate scrutiny to § 922(g)(1)); *United States v. Chovan*, 735 F.3d 1127, 1141–42 (9th Cir. 2013) (applying intermediate scrutiny to § 922(g)(9)’s disarmament of a domestic-violence misdemeanant); *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010) (applying intermediate scrutiny to § 922(g)(9)); *United States v. Reese*, 627 F.3d 792, 802–05 (applying intermediate scrutiny to § 922(g)(8)’s dispossession of certain persons subject to a domestic restraining order); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308, 326–29 (6th Cir. 2014) (applying strict scrutiny to § 922(g)(4)’s dispossession of any person “who has been committed to a mental institution”), *reh’g en banc granted, opinion vacated* (Apr. 21, 2015).

²⁸¹ *Rostron*, *supra* note 245, at 820.

the Second Amendment noting that “[s]trict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way.”²⁸²

When it determined which level of scrutiny was appropriate regarding the firearm prohibition on persons who were committed to a mental institution, the *Tyler* court noted that the difference between strict scrutiny and intermediate scrutiny is based more on theoretical variance than on a real difference. The court noted that “strict scrutiny and intermediate scrutiny can take on different forms in different contexts that are sometimes colloquially referred to as, for example, strict-scrutiny-light or intermediate-scrutiny-plus or the like.”²⁸³ While the courts acknowledge that these levels of scrutiny vary according to who is applying them and in what situation they are used, it appears that the majority of courts applying intermediate scrutiny merely require the government to show that the aims of the government are important and that the means are substantially related to those goals.²⁸⁴

There are only two courts post-*Heller* that have upheld a constitutional challenge to § 922(g)’s firearm restrictions under either form of scrutiny: *Tyler* and *Binderup*.²⁸⁵ Both these courts determined these cases on an “as-applied basis” as opposed to a facial challenge to the statute.²⁸⁶

The *Tyler* court, acknowledging it was in the minority when applying strict scrutiny, found that § 922(g)(4) was unconstitutional as applied to the appellant, who had been committed to a mental institution as a juvenile and had never had another commitment or encounter with the law.²⁸⁷ When considering the government’s

²⁸² *Marzzarella*, 614 F.3d at 96.

²⁸³ *Tyler*, 775 F.3d at 323 (en banc), *reh’g granted, opinion vacated* (Apr. 21, 2015); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678 (6th Cir. 2016) (en banc) (quoting *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1277 (D.C. Cir. 2011) n.8 (Kavanaugh, J., dissenting)).

²⁸⁴ *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

²⁸⁵ The Fourth Circuit in *Kolbe v. Hogan* did uphold a constitutional challenge using strict scrutiny to Maryland’s 2013 ban on semi-automatic weapons, but that case did not interpret § 922(g). *Kolbe v. Hogan*, 813 F.3d 160, 192 (4th Cir. 2016) (en banc), *reh’g granted*, 636 F. App’x 880 (4th Cir. 2016), *on reh’g*, 849 F.3d 114 (4th Cir. 2017).

²⁸⁶ A facial challenge would purport that the prohibitions of § 922(g) would be unconstitutional in any application. As-applied challenges argue that due to a plaintiff’s particular circumstances, the application of the otherwise valid law becomes an unconstitutional restriction on rights. For purposes of this article it is acknowledged that a facial attack on § 922(g)(4)’s prohibitions is unlikely to be successful, particularly in light of the case law regarding § 922(g)’s prohibitions generally. There are people who have been adjudicated a mental defective who are validly included on the NICS list and prohibited from owning firearms. There are also veterans who are declared incompetent by the VA because they were adjudicated mentally incompetent by a court and are reported to the NICS list. It is those veterans who have not been adjudicated a “mental defective” by a court but are only found to be financially incompetent by the VA who are the focus of this Article. Therefore, as-applied challenges will be considered here.

²⁸⁷ The *Tyler* court makes a rigorous assessment of the choices of scrutiny of the other

interest, the court in *Tyler* found that the difference between the strict scrutiny requirement of a “compelling interest” and the intermediate scrutiny requirement of an “important interest” was “unlikely to be relevant to gun controls, since virtually every gun control law is aimed at serving interests that would usually be seen as compelling—preventing violent crime, injury, and death.”²⁸⁸ In *Tyler*, the government argued that the two interests of the government served by the prohibitions of § 922(g)(4) were to prevent suicides and crimes, both of which the court agreed were compelling.²⁸⁹ The court then reviewed whether the government’s restriction on the Second Amendment right was narrowly tailored to serve this interest. The court noted:

Based on *Heller*, a law forbidding possession of firearms by “the mentally ill” is most likely constitutional and satisfies narrow tailoring. A law that captures only a small subset of that group, or a law that captures the entire group but also a significant number of non-mentally ill persons, would fail narrow tailoring.²⁹⁰

Because the prohibition on persons formerly institutionalized for mental health purposes prohibited possession of firearms even when those persons posed no danger to themselves or others, the court found § 922(g)(4) was unconstitutional as applied to the appellant.²⁹¹

The Third Circuit, in *Binderup*, applied intermediate scrutiny to hold that the prohibition of § 922(g)(1)²⁹² was unconstitutional as applied to the appellants who had been convicted several decades earlier of nonviolent misdemeanors carrying a penalty exceeding one year in prison.²⁹³ The court noted that while the purpose of the prohibition on convicted criminals owning handguns had both the important and compelling interest of “preventing armed mayhem,” the government’s attempt to do so here was not an appropriate method of doing so.²⁹⁴ In discussing the government’s

circuits and the numerous reasons why the *Tyler* court chose to use strict scrutiny to evaluate Second Amendment challenges that is worth reading for its own sake. *Tyler*, 775 F.3d at 317–18.

²⁸⁸ *Id.* at 329–30 (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1470 (2009)).

²⁸⁹ *Id.* at 331.

²⁹⁰ *Id.* (citation omitted).

²⁹¹ *Id.* at 343.

²⁹² 18 U.S.C. § 922(g)(1) (2005) (“It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

²⁹³ *Binderup v. Att’y Gen.* U.S., 836 F.3d 336, 356–57 (3d Cir. 2016).

²⁹⁴ *Id.* at 353.

attempt at demonstrating a substantial relationship between that interest and the prohibition on these specific appellants, the court found that there was

no evidence explaining why banning people like them [*i.e.*, people who decades ago committed similar misdemeanors] from possessing firearms promotes public safety. The Government claims that someone like Suarez is “particularly likely to misuse firearms” because he belongs to a category of “potentially irresponsible persons,” and that someone like Binderup is “particularly likely to commit additional crimes in the future.” But it must “present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments.” In these cases neither the evidence in the record nor common sense supports those assertions.²⁹⁵

In addition to reviewing the relationship of the restrictions of § 922(g) to meet the government’s desired ends, both the *Tyler* and *Binderup* courts found that the fact that a prohibited person may apply for a relief from his disability did not save the restrictions from unconstitutionality as applied. Section 925(g) allows prohibited persons to apply to the Attorney General for relief from the prohibition specifically applying to him and that relief may be granted if the applicant can demonstrate that he “will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”²⁹⁶ However, both the *Tyler* and *Binderup* courts noted that Congress has failed to appropriate funds to the DOJ to implement this portion of the statute and has therefore rendered it inoperative.²⁹⁷ While *Tyler* acknowledges that the federal government has offered funds to the states in order to implement the provisions of § 925(c) themselves, the court noted:

Under this scheme, whether Tyler may exercise his right to bear arms depends on whether his state of residence has chosen to accept the carrot of federal grant money and has implemented a relief program. His right thus would turn on whether his state has taken Congress’s inducement to cooperate with federal authorities in order to avoid losing anti-crime funding. An individual’s ability to exercise a “fundamental righ[t] necessary to our system of ordered liberty” cannot turn on such a distinction.²⁹⁸

²⁹⁵ *Id.* at 353–54 (alteration in original).

²⁹⁶ 18 U.S.C. § 925(c) (Supp. I 2002), *amended by* Homeland Security Act of 2002, Pub. L. No. 107-296, 132 Stat. 1636.

²⁹⁷ *Binderup*, 836 F.3d at 355 (citing *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007)); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308, 333 (6th Cir. 2014).

²⁹⁸ *Tyler*, 775 F.3d at 334 (citation omitted) (alteration in original).

No court has upheld the prohibition of § 922(g)(4) under intermediate scrutiny. However, several courts have upheld other restrictions on firearms under this standard, and their decisions are instructive.

The First, Fourth, Seventh, and Ninth Circuits have all upheld the prohibitions relating to those convicted of domestic abuse under § 922(g)(9) under an intermediate scrutiny standard.²⁹⁹ Acknowledging that preventing domestic abuse is an important goal of the government, the courts determined that evidence regarding recidivism rates of domestic abusers and statistics regarding the use of firearms in domestic abuse incidents demonstrated that the prohibition was substantially related to the government's goals.³⁰⁰

Applying intermediate scrutiny, the Fifth Circuit has found that § 922(b)(1)'s prohibition on federally licensed firearms dealers selling handguns to people under the age of twenty-one did not violate the constitutional rights of those under the age requirement.³⁰¹ In the same case, the court found that the government had an important interest in keeping firearms out of the hands of younger adults because statistics demonstrated that they have a higher propensity for violent crime with particular types of weapons.³⁰² The court then found that there was a "reasonable means-ends fit" with the prohibition on adults purchasing specific weapons before the age of twenty-one while allowing them to acquire other types of weapons or to be given weapons by guardians, etc.³⁰³

Other courts have reviewed prohibitions on the right to keep and bear arms outside the lens of § 922 and have used the same two-step inquiry in order to determine the level of scrutiny to apply during constitutional review. For instance, the Second Circuit adopted intermediate scrutiny to review New York's restrictive regulation of publicly carrying firearms.³⁰⁴ The court held that "[r]estricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose" was substantially related to the states' interests in preventing crime and ensuring public safety.³⁰⁵ The court noted that "instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere."³⁰⁶

²⁹⁹ *United States v. Chovan*, 735 F.3d 1127, 1135–36 (9th Cir. 2013); *United States v. Skoien*, 614 F.3d 638, 653–54 (7th Cir. 2010); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011).

³⁰⁰ *Chovan*, 735 F.3d at 1139–41; *Skoien*, 614 F.3d at 641–45; *Booker*, 644 F.3d at 25; *Staten*, 666 F.3d at 167.

³⁰¹ *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 208–09 (5th Cir. 2012).

³⁰² *Id.* at 207.

³⁰³ *Id.* at 209.

³⁰⁴ *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012).

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 98–99.

Similarly, the Third Circuit reviewed a challenge to New Jersey's handgun carry laws which required the applicant to have a justifiable need to carry a weapon in public.³⁰⁷ Applying intermediate scrutiny, the court found that New Jersey had a justifiable and important goal of protecting citizens of the state from violent injury.³⁰⁸ The court determined that New Jersey's method of individually reviewing each application and considering justifiable need by each individual's circumstances was reasonably tailored to serve this need and was therefore constitutional.³⁰⁹

In contrast to the analysis of burdens on the right to bear arms used by the other circuit courts, the D.C. Circuit recently issued an opinion *Wrenn v. District of Columbia* declining to implement the various levels of scrutiny in cases where the restriction results in what is effectively a total ban on the right to keep and bear arms.³¹⁰ In *Wrenn*, the appellants challenged Washington D.C.'s "good-reason" law's restriction of the right to carry in public to those who had a "good reason to fear injury."³¹¹ After an extended review of the historical nature of the right to bear arms in public, the D.C. Circuit determined that the core of the Second Amendment's right to keep and bear arms extends outside the home to self-defense in public.³¹² This is an extension of the right that most other courts have not been willing to find.³¹³ While the D.C. Circuit recognized that *some* citizens might be permitted to bear arms in public for the purpose of self-defense, it noted that the

³⁰⁷ *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

³⁰⁸ *Id.* at 437.

³⁰⁹ *Id.* at 440.

³¹⁰ *Wrenn v. Dist. of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (explaining that laws restricting the right to carry to persons demonstrating some need or justification for public carry are referred to as "good-reason" laws).

³¹¹ *Id.* at 655.

³¹² *Id.*

³¹³ The D.C. Circuit court notes that other circuit courts analyzing "good-reason" restrictions have implemented intermediate scrutiny because they have not done a thorough historical excavation of the right to bear arms outside of the home and incorrectly view the right to bear arms publicly as a lesser "twin" of the right to keep arms in the home. *Id.* at 22–24. The Seventh Circuit is the only other circuit to assert this stance. In *Moore v. Madigan*, Judge Posner wrote that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The Seventh Circuit then struck down Illinois' prohibition on the public carry of firearms without imposing the framework of scrutiny, stating "[o]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states." *Id.* at 941.

good-reason law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs, where these residents are no more dangerous with a gun than the next law-abiding citizen. We say "necessarily" because the law destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations . . . but by design³¹⁴

Because the law became effectively a total ban on bearing arms for average, law-abiding citizens, the law was automatically unconstitutional "without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right."³¹⁵

B. Analyzing the Prohibition on Financially Incompetent Veterans Reported by the VA Using the Two-Step Process

Determining which level of scrutiny to give to the inclusion under § 922(g)(4) of veterans determined financially incompetent for VA purposes is a tricky issue. Many courts have indicated that they rely upon intermediate scrutiny in cases where the "core" right granted by the Second Amendment—the right to defend one's self in the home with a firearm (or in some circuits the right to bear arms in public)—was not affected by the challenged law.³¹⁶ This implies that these specific courts may prefer strict scrutiny (or an automatic striking down of any restriction when possession in the home is affected) as is the case with these veterans. However, other circuit courts are inclined to use intermediate scrutiny regardless of where the possession and use of the firearm take place, as the prohibition of ownership for those convicted of domestic abuse crimes demonstrates.³¹⁷ These courts have viewed the "core" of the Second Amendment right even more strictly and look to the language in *Heller* describing the core of the Second Amendment as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."³¹⁸ Additionally, the *Binderup* court noted that procedures allowing for relief from the

³¹⁴ *Id.* at 28.

³¹⁵ *Id.* at 26.

³¹⁶ *See, e.g., Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) ("In essence, this is the core of the First Amendment, just like the core of the right conferred upon individuals by the Second Amendment is the right to possess usable handguns *in the home* for self-defense."); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) ("[W]e believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.").

³¹⁷ *United States v. Chovan*, 735 F.3d 1127, 1139–41 (9th Cir. 2013); *United States v. Skoien*, 614 F.3d 638, 641–45 (7th Cir. 2010); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011).

³¹⁸ *Chovan*, 735 F.3d at 1138 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)) (emphasis added).

disability may save an otherwise unconstitutional attack on the core right of the Second Amendment:

Even if a law that “completely eviscerates the Second Amendment right” would be *per se* unconstitutional under *Heller*, § 922(g)(1) is no such law [P]ersons convicted of disqualifying offenses may under some circumstances possess handguns if (1) their convictions are expunged or set aside, (2) they receive pardons, or (3) they have their civil rights restored. And were Congress to fund 18 U.S.C. § 925(c), they could ask the Attorney General to lift the ban in their particular cases.³¹⁹

It is entirely possible that despite the fact the VA’s determination of financial incompetency and subsequent DOJ action of including these persons on the NICS list seriously limits a veteran’s right to purchase and possess firearms, a challenge to this prohibition will likely be reviewed under an intermediate scrutiny standard. This standard may be applied by the courts because the “responsible” nature of the veterans affected is in question or because the veteran does have an avenue to appeal the disability leading to the removal of his rights.

Applying the intermediate scrutiny standard to the prohibition on veterans declared financially incompetent for VA purposes, the government must articulate an important purpose for prohibiting these veterans from owning firearms.³²⁰ The important purpose, based upon remarks made on the House Floor regarding the passage of the Veterans 2nd Amendment Protection Act, appears to be a great concern that these veterans have a higher likelihood of harming themselves and committing suicide.³²¹ Secondly, there is also concern that the veterans being reported as financially incompetent by the VA are a potential threat to the safety of others.³²² The prevention of suicide and the safety of the community are obviously important and even compelling governmental goals. Undeniably, suicide among veterans is statistically higher than the civilian population and suicide takes the lives of approximately twenty veterans every day.³²³

There is also a belief that those who have been “adjudicated as a mental defective” must be mentally ill, a category of persons few disagree should be restricted in firearm ownership.³²⁴ While the concerns about suicide among veterans

³¹⁹ *Binderup v. Att’y Gen.* U.S., 836 F.3d 336, 345 (3d Cir. 2016).

³²⁰ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

³²¹ 163 CONG. REC. H2107 (daily ed. Mar. 16, 2017) (statements of Rep. Thompson and Rep. Bera).

³²² 163 CONG. REC. H2106 (daily ed. Mar. 16, 2017) (statement of Rep. Takano); 163 CONG. REC. H2104 (daily ed. Mar. 16, 2017) (statement of Rep. Etsy).

³²³ U.S. DEP’T OF VETERANS AFFAIRS, VA SUICIDE PREVENTION PROGRAM, FACTS ABOUT VETERAN SUICIDE (2016), https://www.va.gov/opa/publications/factsheets/Suicide_Prevention_FactSheet_New_VA_Stats_070616_1400.pdf [<https://perma.cc/4KMM-6B4V>].

³²⁴ *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 775 F.3d 308, 317 (6th Cir. 2014) (“For § 922(g)(4) prohibits firearm possession not just by the mentally ill but by anyone ‘who has

and restriction on gun ownership by the mentally ill are well-made, one must ask if this process is truly taking weapons out the hands of those who are most likely to use them to commit suicide or potentially harm others. Therefore, the more important portion of this analysis will likely turn on whether the reporting of these financially incompetent veterans to the NICS list is “substantially related” to these ends or, in a more stringent type of intermediate scrutiny analysis, narrowly tailored to achieve those ends.³²⁵

To be certain, there are veterans who the VA determines to be financially incompetent for VA purposes because a court has in some way adjudicated the veteran to be mentally incompetent in another forum.³²⁶ These veterans may range from being declared criminally insane to being declared mentally incompetent to perform some action and appointed a guardian or conservator by a court.³²⁷ The rest of the veterans deemed financially incompetent are determined by the VA to be unable to handle their payment of VA benefits.³²⁸ As has been demonstrated, these decisions by the VA are not pinned to a diagnosis of a mental illness. Many of those declared financially incompetent by the VA may suffer no mental illness at all or are not incapacitated due to that illness.

For instance, floor debate in the House revealed that more than 1,000 children entitled to benefits because they were dependents of a deceased veteran have been reported to the NICS list by the VA “likely because [the] VA appointed a fiduciary because they are too young to handle their own money.”³²⁹ That children, already not permitted to own firearms, are submitted to the NICS list displays the flaws in this system—literally anyone who is appointed a fiduciary is reported to the NICS list and will forever have to admit that they were once a prohibited person for firearm

been committed to a mental institution.’ That these two categories are not coextensive is made clear by the very fact that the language of § 922(g)(4) expressly refers to two separate groups.”); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 719 (M.D. Pa. 2016) (“[I]t appears that this statute subsection [§ 922(g)(4)] was likely animated by the same concerns that justified the felon gun dispossession statute subsection in . . . That is, the concern that certain individuals, whether those with felonies or those with mental illness”); *see, e.g.*, 163 CONG. REC. H2104 (daily ed. Mar. 16, 2017) (statement of Rep. Esty) (“[T]his bill could put mentally ill veterans in harm’s way by giving them easy access to firearms.”); 163 CONG. REC. H2113 (daily ed. Mar. 16, 2017) (statement of Rep. Wasserman-Shultz) (“[O]ver one hundred-seventy thousand mentally ill veterans would be removed from the National Instant Criminal Background Check System. . . . [T]his bill prioritizes putting firearms in the hands of mentally ill veterans who are already at serious risk.”).

³²⁵ *Clark*, 486 U.S. at 460; *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 338–39 (2010) (citation omitted).

³²⁶ EVALUATING COMPETENCY, *supra* note 42, § 5(b).

³²⁷ 27 C.F.R. § 478.11(a)–(b) (2014).

³²⁸ 38 C.F.R. § 3.353(a)–(b) (2018).

³²⁹ 163 CONG. REC. H2103 (daily ed. Mar. 16, 2017) (statement of Rep. Roe); 38 C.F.R. § 3.22 (2012); 38 C.F.R. § 3.55 (2006).

ownership purposes. Additionally, suffering from a mental illness is not an automatic indicator that a beneficiary may be declared financially incompetent, as was noted during the floor debate by Representative David Roe:

[T]o show you how the VA's policy is not consistent: just as an example, a veteran who is rated at 100 percent disabled for PTSD is not automatically given a fiduciary, even though the symptoms required for that rating may include suicidal or homicidal ideation. So they are very inconsistent about how they do this. And of the 915,744 veterans who have a service-connected PTSD condition, only 1.7 percent of them have a fiduciary.³³⁰

To be clear, not all veterans rated at 100 percent for PTSD have received that rating due to suicidal or homicidal ideations.³³¹ These are just some indicators that a veteran may be entitled to a 100 percent rating.³³² The more important point is that at no time during this “adjudication” process is any consideration given to whether a person may be a danger to himself or to others.³³³ Veterans who may qualify as such a danger are not declared financially incompetent by the VA unless some comment is made by a C&P examiner or some scrap of evidence is found in the file that the veteran cannot manage his own funds.³³⁴ Meanwhile, those veterans who pose no harm to anyone and may or may not suffer from a mental illness are reported in the same manner as those society has determined to be “too irresponsible or too dangerous to be trusted with firearms,” such as felons and drug addicts.³³⁵ As the D.C. Circuit noted in *Wrenn*, “the point of the [Second] Amendment [is] . . . that guns would be available to each *responsible citizen* as a rule (*i.e.*, at least to those no more prone to misuse that access than anyone else).”³³⁶ The disconnect between this principle and the VA's procedures is bewildering.

³³⁰ 163 CONG. REC. H2107 (daily ed. Mar. 16, 2017) (statement of Rep. Roe).

³³¹ PTSD is a condition that can result from a traumatic event. It affects military members and civilians alike. *Post-Traumatic Stress Disorder*, NAT'L INST. OF MENTAL HEALTH (Feb. 2016) <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml> [<https://perma.cc/5JV4-QWWB>]. Diagnosing PTSD requires that the patient meet eight different criteria ranging from re-experiencing the event to avoidance and negative thoughts. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271–72 (5th ed. 2013). None of the listed criteria involve suicidal or homicidal thoughts.

³³² Other indicators of “[t]otal occupational and social impairment” which may lead to a disability rating of 100% include “intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives . . .” 38 C.F.R. § 4.130 (2014).

³³³ See *supra* text accompanying notes 4 and 62.

³³⁴ See discussion *infra* Section I.B.2.

³³⁵ *Keyes v. Lynch*, 195 F. Supp. 3d 702, 719 (2016).

³³⁶ *Wrenn v. District of Columbia*, 864 F.3d 650, 665–66 (2017).

Legislators who opposed stopping the VA's reporting of financially incompetent veterans to the DOJ nonetheless recognized that many who get caught up in the VA's reporting system are not people the NICS list intends to capture. For instance, Representative Elizabeth Esty notes that "I agree that the current process is overinclusive, and I agree that we must do more to ensure veterans have sufficient notice, an opportunity to be heard, and a meaningful opportunity to appeal any decision that may impact their constitutional rights."³³⁷ While government action reviewed under intermediate scrutiny is not required to be the least restrictive means of accomplishing the goal,³³⁸ the government means must not burden a right more than is reasonably necessary in order to do so.³³⁹

In light of this haphazard determination of who is reported and the over-inclusion of non-dangerous veterans, a court would be hard-pressed to find that the VA's practice of reporting veterans found financially incompetent to the NICS list and thus prohibiting them from possessing or purchasing firearms is substantially related to keeping firearms out of the hands of dangerous persons—particularly when no adjudication is made as to the veteran's dangerousness. Additionally, while the BATFE has defined "a mental defective" as someone who cannot contract or manage his own affairs, the VA's declaration of financial incompetence does not determine a veteran's ability to contract.³⁴⁰ Nor does the VA adjudicate a veteran's ability to manage his affairs in total.³⁴¹ The VA's decision applies only to a veteran receiving financial benefits from the VA and not to any other monies or interests that the veteran may very well be managing himself.

Congress has already decided that these financial incompetency adjudications by the SSA would not be successful enough in identifying dangerous individuals.³⁴² Congress's joint resolution forbidding the SSA from reporting its financially incompetent beneficiaries to the NICS list indicates that the risk of depriving many law-abiding, responsible citizens, of their constitutional rights outweighs the possibility of labeling some at-risk individuals as prohibited persons.³⁴³

³³⁷ 163 CONG. REC. H2104 (daily ed. Mar. 16, 2017) (statement of Rep. Esty).

³³⁸ See, e.g., *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 661–62 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 796–99 (1989); *United States v. Marzzarella*, 614 F.3d 85, 98 (3rd Cir 2010).

³³⁹ See, e.g., *Turner Broad. Sys. Inc.*, 491 U.S. at 661–62; *Ward*, 491 U.S. at 799; *Marzzarella*, 614 F.3d at 98.

³⁴⁰ 38 C.F.R. § 3.353(a)–(b) (2018).

³⁴¹ *Id.*

³⁴² See H.R.J. Res. 40, 115th Cong. (2017).

³⁴³ The fact that the federal government is treating two similar categories of persons adjudicated financially incompetent by a federal agency differently may raise concern regarding Equal Protection violations as well. The equal protection clause of the Fourteenth Amendment, applied to the Federal government through the Fifth Amendment, prohibits government from denying people the equal protection of laws. Similarly situated people must be treated by the government in the same manner. The scope of those potential violations are outside the purview of this Article as their discussion would be another article itself. See H.R.J. Res. 40, 115th Cong. (2017).

Considering that the VA's isolated adjudication of financial incompetency has a high likelihood of being made erroneously (based upon the remand rates of appeals from VA decisions), along with the complicated evidentiary standard of proof required of a VA employee with no specialized training in either mental health, medicine, or law, the injustice becomes clearer. The decision to report these veterans as "mental defectives" is not "reasonably" or "substantially related" to keeping weapons out of the hands of those likely to harm themselves or others. Viewing these concerns in light of the long wait times for judges to actually review decisions of financial incompetency, it is apparent that a veteran does not have a reasonable method of appealing these incompetency decisions.

Based upon these facts, an as-applied challenge to the application of § 922(g)(4) to a veteran declared financially incompetent by the VA is likely to succeed under intermediate scrutiny. If the challenge passes intermediate scrutiny, it would also pass the stringent strict scrutiny standard.

VI. PROTECTING VETERANS FROM SECOND AMENDMENT VIOLATIONS

Two major concerns exist within the process of stripping veterans determined "financially incompetent for VA purposes" of their Second Amendment rights. The first concern deals with the process used to make determinations of financial incompetency. Making this process fairer, more efficient, and speedier could be the subject of another article and has already been written on as noted earlier.³⁴⁴ The second concern focuses on the decision to use faulty adjudications to then label the veterans "adjudicated as a mental defective." It is this second concern that these suggestions address.

The first step is to stop using the VA's adjudications of financial incompetency to affect veteran's Second Amendment rights. The House's Veterans 2nd Amendment Protection Act is a first step in protecting the rights of future veterans declared financially incompetent by the VA.³⁴⁵ The Senate should pass this bill and the President should sign it to stop the unconstitutional infringement on these rights. This would prevent additional veterans from being affected. However, this bill provides no remedy for the 150,000 veterans already on the NICS list due to a

³⁴⁴ An analysis of the incompetency procedures of the VA for due process violations under *Goldberg v. Kelly*, 397 U.S. 254, 266–68 (1970) or *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976) is a worthy undertaking, but beyond the scope of this Article as it could fill a volume on its own merit. See, e.g., Benjamin P. Pomerance & Katrina J. Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, 23 WIDENER L. REV. 1, 27 n.158 (2017) (citing *Solze v. Shinseki*, 26 Vet. App. 118, 126 n.13 (2013) (Lance, J., dissenting) (stating that "[the] growing consensus outside of VA [is] that the fiduciary system is broken")); *id.* at 27 n.159 (citing U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, OFFICE OF AUDITS & EVALUATIONS, NO. 14-01883-371, AUDIT OF FIDUCIARY PROGRAM'S MANAGEMENT OF FIELD EXAMINATIONS (June 1, 2015)).

³⁴⁵ Veterans 2nd Amendment Protection Act, H.R. 1181, 115th Cong. (2017).

financial incompetency determination. A plan must be introduced to reinstate the constitutional rights of the Second Amendment to these veterans.

One solution is to remove all names from the NICS list reported by a VA adjudication of financial incompetence that was not predicated on a civil or criminal court action finding the veteran incompetent. Acknowledging that this approach will encounter political backlash, a more measured approach may require the VA to comb through all cases of veterans referred to the NICS list and determine the reason for the decision of incompetency. Those veterans whose incompetency for VA purposes was based upon a state court decision that a veteran was mentally incompetent could be separated out from veterans whose incompetency determination was based solely on a VA finding of financial incompetence for VA purposes. Veterans found incompetent for VA purposes without an underlying judicial finding of mental incompetence could be immediately culled from the NICS list.

Another option could involve revamping the appeals process for veterans to demonstrate that they are not a “mental defective”—because they are not a danger to themselves or others—with an expectation that such appeals would be granted liberally. The current VA process to appeal for relief from the prohibitions of § 922(g)(4) is extremely onerous on a veteran. A more streamlined process where a veteran may certify that he has never been adjudicated dangerous to himself or others, combined with a background check that he has never been convicted of a violent crime, may be the least restrictive option to reinstate these veterans' rights. This method would still appeal to those who are concerned that a wholesale removal of financially incompetent veterans from the list will put guns in the hands of the dangerously mentally ill.

A more restrictive option could require the veteran to go through a hearing of some type in a federal district court where the judge and prosecutor could investigate the specific background of the veteran to determine that he is not a danger to himself or others. This, of course, would be extremely burdensome to both the veteran and the government and would lead to numerous costs, including the cost of an attorney for the veteran, unless the court appoints attorneys to the veterans at no cost. This final plan is not ideal because it may allow a court and prosecutor to come at these veteran's cases from a presumption that the veteran is a “mental defective” and place a burden on the veteran to demonstrate why he is not.

Instead, due to the unconstitutional removal of the veteran's Second Amendment rights, the burden should be placed on the government to demonstrate why the veteran is a danger to himself or others or lacks the mental capacity to contract or manage his own affairs. If the government cannot demonstrate this, then the veteran should be removed from the NICS list.

Convoluting options involving the restoration of constitutional rights to those improperly stripped of them is not an ideal solution to this problem and should be avoided in favor of a more streamlined process.

CONCLUSION

The effect on those veterans currently being deprived of their Second Amendment rights due to a VA declaration of financial incompetence is significant. The process by which this deprivation occurs is uneven, imprecise, and often flawed both in substance and procedure. Veterans are the only classification of people who are categorically denied the right to possess a firearm because they are found incapable of handling a financial payment from a federal agency, without a more generalized finding or judicial determination that they are unable to manage their own affairs or that they are a danger to themselves or others. This situation is untenable and even Congress recognizes that something must be done.

To be clear, there are veterans currently flagged in the background check system who should not be there, and we need to create a fair and streamlined process for veterans to appeal their status.

But there is a balance between protecting veterans' Second Amendment rights and protecting veterans who are a danger to themselves or others.³⁴⁶

This statement returns us to the question asked at the beginning of this Article: "[W]hile the current process the VA uses to declare a veteran a 'mental defective' may inadvertently identify some veterans who are a danger to themselves or others and thus prevent them from obtaining firearms, is the overreaching impact on the constitutional rights of veterans who have never been adjudicated a threat an acceptable trade-off?" Based upon the court's understanding of the right to keep and bear arms, the clear realization of both proponents and opponents of the Veterans 2nd Amendment Protection Act that the VA's current process violates the constitutional rights of many veterans, and the plain realization that the determinations of financial incompetency by the VA are often haphazardly made, the answer is clear. Depriving veterans of their constitutional rights based upon the VA's process of determining financial incompetence for VA purposes is not acceptable. This realization played a role in Congress's joint resolution to prevent the SSA from doing the same thing.

Despite this recognition, Congress continually stalls in the process of cleaning it up, leaving one to wonder why it is acceptable to stamp out the constitutional rights of our military veterans in a way we do not endorse for our other citizens under the Social Security system. Why are the rights of military veterans viewed as less important, less treasured, and less secured than the rights of other Americans? Litigation on this issue and federal court orders may be the only way to instill a sense

³⁴⁶ 163 CONG. REC. H2106 (daily ed. Mar. 16, 2017) (statement of Rep. Takano).

of urgency in Congress to reinstate to our veterans the rights they have fought for and secured for the rest of our nation. Regardless of the method used to restore the rights unconstitutionally stripped from veterans, something must be done now because to continue to dishonor our veterans in this manner truly is a national embarrassment.